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Robert Weisberg

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REALITY-CHALLENGED PHILOSOPHIES OF PUNISHMENT

ROBERT WEISBERG*

I. INTRODUCTION: THE NEW SUBJECT OF MASS INCARCERATION

The American criminal justice system is arguably the most punitive in the world today¹ and the most punitive in American history.² This phenomenon has now acquired a dramatic name, mass incarceration, meant to induce anxiety about the paradox (or about *whether* it is a paradox) that the wealthiest and most powerful free-market democracy imprisons such an anomalously high percentage of its population at a time when crime itself is not one of the nation's pressing social problems.³

Over the past decade, the humanities and social sciences have yielded substantial literature examining the rise of mass incarceration

* Edwin E. Huddleson, Jr., Professor of Law, Stanford University; Director, Stanford Criminal Justice Center. This Article is a revised and extended version of the George and Martha Barrock Lecture on Reality-Challenged Philosophies of Punishment, which the author gave at Marquette University Law School on October 6, 2011. My thanks to Hans Anderson, Stanford J.D. 2014, for his superb assistance on this Article.

1. The American ratio of incarcerated people to total population is about seven times as high as those of other industrialized democracies. ROY WALMSLEY, WORLD PRISON POPULATION LIST 1–3 tbls.1–2 (8th ed. 2009), *available at* http://www.prisonstudies.org/images/downloads/wppl-8th_41.pdf. For slightly earlier figures, see BRUCE WESTERN, PUNISHMENT AND INEQUALITY IN AMERICA 14 fig.1.2 (2006). Unless otherwise indicated in this Article, numbers or rates for incarceration or imprisonment in the United States refer to both prisons and jails.

2. WESTERN, *supra* note 1, at 13 (noting that the U.S. incarceration rate in 2003 was five times the historical average over the period of 1925–1975).

3. Notions of “American exceptionalism” in regard to criminal justice have focused not on incarceration (where the anomaly is fairly new) but on the long-term high-crime anomaly. The perennial, if questionable, themes have been the power of the frontier and individualism in our mythic self-conception, as well as history and consequences of slavery and, to a lesser extent, late-nineteenth-century immigration. See DEBORAH L. MADSEN, AMERICAN EXCEPTIONALISM 1–4 (1998); Robert Weisberg, *Values, Violence, and the Second Amendment: American Character, Constitutionalism, and Crime*, 39 HOUS. L. REV. 1, 21–22, 29, 43 (2002). In recent years, as American crime rates have increasingly converged with those in Europe, the focus on crime exceptionalism has been more about homicide than crime generally, and even there, the gap is narrowing. FRANKLIN E. ZIMRING & GORDON HAWKINS, CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA 51 (1997). In any event, whether high crime can in turn explain high incarceration is itself highly questionable, as discussed *infra* Part III.

from various perspectives, ranging from econometric analyses of contributory factors to cultural critiques of American exceptionalism in penal policy. At the same time, in an oddly parallel but disconnected universe, legal and academic commentators have continued their long engagement in jurisprudential debates about the purposes of punishment (retribution, general and specific deterrence, incapacitation, and rehabilitation). But mass incarceration has barely registered in these debates. Perhaps the key irony about this disconnected parallelism is that the dominant theme in these jurisprudential debates in the academic world has been a robust revival of retributivism,⁴ the very rationale for punishment most associated with the specific legal changes of recent decades that are the most obvious causes of the great increase in incarceration. Indeed, even the many new robust *critiques* of modern retributivism have only barely addressed the social costs created by U.S. penal policy over the past four decades.

Amid the passionate controversy about the rise of mass incarceration, some recent commentary helps us understand the challenges that this phenomenon poses to conventional punishment theory. I will orient my discussion around *Punishment and Inequality in America*, by sociologist Bruce Western and co-researchers Leonard Lopoo and Becky Pettit. Beyond its express mission of social science analysis, this recent work seems also to serve as a call for the embarrassment of our jurisprudence in light of the penal policies to which this jurisprudence often lends aid and comfort. My discussion will rely also on Michael Tonry and Franklin Zimring (and his frequent co-author Gordon Hawkins), major scholars in the legal academy who have bridged the unfortunate divide between legal academia (the home of punishment jurisprudence) and criminology. Tonry's timely new reader, *Why Punish? How Much?*, usefully collects the classics of the field and exemplars of some of the newer intellectual trends; thus Tonry can serve as a running complement to Western and the other books on mass incarceration.⁵ I rely on Zimring (and his frequent co-author Gordon Hawkins) for a number of major empirical and policy studies that have richly complicated our understanding of the supposed purposes of American criminal punishment.

4. For a review of this revival, see Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 845–46 & n.2 (2002).

5. Michael Tonry, *Introduction: Thinking About Punishment*, in *WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT* 3, 3–4, 7 (Michael Tonry ed., 2011) [hereinafter Tonry, *Introduction*].

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There is at least a weak excuse for this disconnection between theory and social fact regarding American incarceration. In their magisterial 1991 book, *The Scale of Imprisonment*, Zimring and Hawkins reviewed the empirical challenge of explaining the incarceration rates of societies and observed that “there is no necessary concordance between a particular set of jurisprudential principles and the extent of the prison population resulting from the application of those principles.”⁶ But this empirical difficulty hardly exonerates those who place the rarefied jurisprudence of punishment at the center of the academic world of criminal justice at a time when the metastasis of punishment has become a defining feature of their society.

It is worth placing Western’s book in the context of the great proliferation of recent books about mass incarceration. Todd Clear examines the removal of young men from inner-city neighborhoods, which has perversely devastated social and family structures and reinforced criminal proclivities in some who remain.⁷ Anthony Thompson looks at the back end of incarceration, examining how the absence or failure of mental health care, drug counseling, and job placement for released inmates exacerbates these tragic forces.⁸ Ruth W. Gilmore attributes much of mass incarceration to a prison-building boom enabled by surpluses of land, labor, and finance capital.⁹ Marie Gottschalk views the “carceral state” and “penal populism” as unintended consequences of social and political forces, including progressive activism to combat sexual assault and domestic violence and a weakened welfare state that makes victims’ rights advocates into law enforcement allies.¹⁰ Taking an international and historical perspective, James Whitman highlights the irony that European traditions of social hierarchy forbade degrading punishments for high-status offenders and this solicitude trickled down the social ladder. Comparatively, in America, distrust of government power, aversion to hierarchy, and

6. FRANKLIN E. ZIMRING & GORDON HAWKINS, *THE SCALE OF IMPRISONMENT*, at xii (1991).

7. TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* 86–87 (2007).

8. See ANTHONY C. THOMPSON, *RELEASING PRISONERS, REDEEMING COMMUNITIES: REENTRY, RACE, AND POLITICS* 1–2, 4, 7 (2008).

9. RUTH WILSON GILMORE, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* 85–86 (2007).

10. MARIE GOTTSCHALK, *THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA* 77–79, 115 (2006); see also Marc Mauer, *The Causes and Consequences of Prison Growth in the United States*, in *MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES* 4, 4–6 (David Garland ed., 2001) (discussing the changes in criminal justice policy that contributed to a rise in incarceration rates beginning in the 1970s).

belief in individualism led to a crude egalitarianism of harsh punishment.¹¹ Also taking a comparative approach in his own monograph, Michael Tonry eschews any question-begging notion of a unique American punitive culture. Instead he isolates the phenomenon of “moral panic”—the sudden eruption of anger or fear, sometimes sparked by a notorious violent crime, sometimes by an epidemic of concern over a form of deviance-like drugs—that can lead to previously unthinkable policies that are then perpetuated through legal inertia.¹²

Some of the new major books on mass incarceration stand somewhat apart from this eclectic set of commentaries. Works by David Garland¹³ and Jonathan Simon¹⁴ are in the tradition of grand social theory, linking mass incarceration to seismic shifts in the ideology of our political economy toward modern neoliberalism, and viewing our penal system as a neoliberal instrument to control social disorder and manipulate the labor economy. New books by Glenn Loury¹⁵ and Michelle Alexander¹⁶ are passionate moral indictments of incarceration as the reproducer and enforcer of racial caste lines.

Western's book typifies the eclectic and more ground-level approaches of the first set of new books and is perhaps the most comprehensive and methodologically versatile among them. As for the second group, although Western acknowledges the larger arc of historical forces of the last century, he is cautious about broad claims of social theory and ideology. While deeply sensitive to the racial implications of the imprisonment boom, his research underscores that income and education levels, while tragically inversely correlated with race, are now emerging as the dominant predictors of the social stratification wrought by incarceration.¹⁷

On the surface, Western presents a fairly dry, statistically based picture of incarceration in the United States, and he does not explicitly

11. See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 11 (2003).

12. MICHAEL TONRY, *THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE* 85–96 (2004).

13. DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY*, at x (2001).

14. JONATHAN SIMON, *GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR* 6 (2007).

15. See GLENN C. LOURY, *RACE, INCARCERATION, AND AMERICAN VALUES* 10–11 (2008).

16. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 1–2 (2010).

17. WESTERN, *supra* note 1, at 11–12. He infers that the racial disparity in imprisonment has gone down slightly in recent years, but that the class disparity has increased. *Id.* at 30–31.

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discuss theories of punishment. His primary concern is the economic implications of modern American penal policy, and I stress the deliberate ambiguity or vagueness of the term “implications” because it usefully covers various permutations of cause and effect, as well as merely suggestive associations. Western indicts modern penal policy as a “systematic state influence on wages and employment” that exacerbates social and economic inequality at a time when the urban labor market for unskilled people is collapsing.¹⁸ Moreover, in a bizarre irony that he explains in detail, American incarceration hides many of its implications, because our statistical self-assessments of unemployment and income exclude the prison population from their denominators.¹⁹

But Western is not concerned with ascribing malevolent intentions to government or social hierarchy, nor, even in his formal statistical analyses, does he commit himself to any overarching econometric explanation of the cause of our incarceration rate. At times he proffers some causal explanations, at times he refutes others’ overly confident casual analyses, and at times he identifies striking correlations without claiming their causal significance. Conversely, he is somewhat bolder in proffering explanations of what mass incarceration itself has caused.

Western’s overall concern is what punishment *means* chiefly in the sense of what punishment *has done*, and mainly what it has done is to become the dominant social institution through which an increasing number of poor Americans live their lives. As the self-reinforcing consequence of certain short-term political governmental decisions and prevalent social attitudes thirty years ago, prison and its aftermath frame the lives of people as much as or more than does school, career, or marriage. As a result, Western implicitly forces us to realize that our standard litany of punishment theories is simply irrelevant to the reality we confront. The penal system that Western documents has no rational connection to either retributive (individual desert) theories of punishment or deterrence or other consequentialist rationales. It is a system that, deliberately or not, reinforces the economics and demographics of diminished social status, and does so in reckless disregard of its measurable consequences.

In Part II, relying on Western’s book and other sources, I review the tragic demography of contemporary American incarceration, with its drastic disproportions of young and less educated minority men. Part

18. *Id.* at xii.

19. *Id.* at 94–95.

III reviews the most plausible explanations of the sharp upward curve of the imprisonment rate in the last thirty years, noting specific legislative changes and prosecutorial charging patterns, and some of the political forces that may underlie them. Part IV then returns to Western to examine the key social and economic consequences of the rise of incarceration, most notably the lifetime earnings and employment penalty that makes past incarceration a virtually permanent status for millions of Americans. Part V then offers a brief review of modern theories of punishment in our jurisprudence, concluding that the dominant theories, most notably the newly robust retributivism, either ignore the empirical realities of mass incarceration or address them only in evasive and feckless ways. The Article concludes that both deontological and utilitarian philosophies of punishment will founder in irrelevance unless they accept some intellectual responsibility for engaging the stubborn facts of a system of imprisonment they often justify or enable.

II. THE DEMOGRAPHY OF AMERICAN IMPRISONMENT

Almost 1% of the population of the United States is currently behind bars. Another 2% is on parole or probation, and hence at risk of incarceration (or reincarceration) at any time.²⁰ The ratio of prisoners to population is too crude a measure to allow meaningful comparisons among nations, given differences in quality of statistics, crime definitions, and administrative schemes. Nevertheless, the United States is clearly an outlier not just among developed democracies (our ratio of roughly 700 prisoners per 100,000 people is about six times higher than the average for European Union nations) but among all nations (Russia and South Africa trail slightly with about 600 and 400 prisoners per 100,000 people, respectively).²¹

The composition of the U.S. prison population will surprise no one. About 35% of prisoners are white, less than half the proportion in the

20. Over 4 million Americans are now on probation, LAUREN E. GLAZE & THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, PROBATION AND PAROLE IN THE UNITED STATES, 2010 (2011), over 700,000 are in county or local jails, TODD D. MINTON, U.S. DEP'T OF JUSTICE, JAIL INMATES AT MIDYEAR 2010—STATISTICAL TABLES (2011), and 1.5 million are in federal or state prison, PAUL GUERINO ET AL., U.S. DEP'T OF JUSTICE, PRISONERS IN 2010 (2011). These absolute numbers have increased fourfold to fivefold in the last thirty years, during which time the American population grew about 30%. See John Roman & Aaron Chalfin, *Does it Pay to Invest in Reentry Programs for Jail Inmates?* 2–6 (The Urban Inst., Jail Reentry Roundtable Initiative, June 27–28, 2006) available at http://www.urban.org/projects/reentry-roundtable/upload/roman_chalfin.pdf.

21. WALMSEY, *supra* note 1, at 2 tbl.1, 3 tbl.2, 5 tbl.4.

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general population. About 19% of the prison population is denominated Hispanic, compared to 15% of the general population. About 44% of the prison population is African-American, more than three times the 12% share of the general population.²² From another angle, Western notes that in 2000, 2.1% of all men aged eighteen to sixty-five were incarcerated, but this imprisoned population represented 1.0% of white men, 3.3% of Hispanic men, and 7.9% of African-American men.²³ The racial disparity in incarceration greatly exceeds that for unemployment, nonmarital child bearing, and infant mortality.²⁴

Western's study also uncovered the independent significance of education level. Western crunches the numbers this way and that way, each statistical angle yielding progressively more depressing or even terrifying insights. Joining education level to race, he looks at the chances of members of a cohort going to jail or prison. Most starkly, in 2000, regardless of race, people without high school degrees were five times more likely to be in prison than those with high school degrees;²⁵ and black men born in the 1960s who did not complete college were twice as likely to have a prison record as they were to have military service.²⁶ By age 35, black men are more likely to have gone to prison than received a college degree; black high school dropouts are more likely to have a prison record than union membership; and non-college black men are more likely to have a prison record than military service.²⁷ As we move down the educational ladder, and with a strong racial

22. See U.S. CENSUS BUREAU, POPULATION BY AGE, SEX, RACE, AND HISPANIC OR LATINO ORIGIN FOR THE UNITED STATES: 2000 tbl.1 (2001), available at <http://www.census.gov/population/www/cen2000/briefs/phc-t9/tables/tab01.pdf> (providing racial breakdown of U.S. population in 2000); Richard Willing, *USA's Prison Population a Record, but Growth Slowing*, USA TODAY (Nov. 7, 2004), http://www.usatoday.com/news/nation/2004-11-07-women-prison_x.htm (providing racial composition of U.S. prison population as of December 31, 2003).

23. WESTERN, *supra* note 1, at 17 tbl.1.1.

24. See *id.* at 16.

25. *Id.* at 73.

26. More specifically, if we look to Western's later generation of men, men born between 1965 and 1969 (the ones who matured during the biggest incarceration spike), as of their thirty-fifth birthday, white men had a 3.2% chance of being incarcerated, a 31.6% chance of completing college, a 14.0% chance of serving in the military, and a 72.5% chance of getting married. *Id.* at 29. For black men of that generation, 22.4% had been in prison, as opposed to 12.5% completing college, 17.4% joining in the military, and 59.3% being married. If we focus solely on those who did not complete college, 6.0% of white men had been in prison by age thirty-five, 73.5% had gotten a high school degree or GED, 13.0% had served in the military, and 72.8% had married. For blacks, the respective numbers were a 31.9% chance of prison, a 64.4% chance of finishing high school, a 13.7% chance of military service, and a 55.9% chance of marriage. *Id.* at 29.

27. *Id.* at 19 tbl.1.2, 29 tbl.1.3.

disproportion, prison becomes a “modal life event,” a tediously predictable part of the condition of being an African-American man in the United States.

III. CAUSES OF THE INCARCERATION BOOM

The above figures, especially those involving education level (and by implication, economic status), might seem to have some causal resonance, but Western offers them chiefly as straightforward statistical demographic snapshots. Starting in the early 1970s, the index crime rate increased, peaking at levels 100%–300% higher in the 1980s and early 1990s than in 1970, but has since dropped to a level equivalent to the early 1970s.²⁸ By contrast, the imprisonment rate has risen steadily over the same period, and today remains roughly 400% higher than it was in 1970.²⁹ The positive story should be that the incarceration increase of the 1970s through the 1990s was caused by an increase in the crime rate, while the post-1990 drop in the crime rate was caused by the increasing incarceration rate. Both phases of this story are highly contestable.

The Scale of Imprisonment offered a global and historical review of the data and the reasons why imprisonment rates may have little to do with measurements of crime.³⁰ For example, some large proportion of crimes never lead to incarceration, and the gap surely increases when we add contemporary drug crimes to the traditional index of serious crimes. Additionally, public and political pressure can drive imprisonment, often by legislating new crimes. This pressure is either indifferent to or mischaracterizes the crime rate, and crime may be significantly determined by the percentage of young males in the population, which changes less quickly and severely than the imprisonment rate. Refining these counterintuitive insights, Western observes that juvenile crime and adult crime usually move together, and almost all adult criminals have been juvenile offenders.³¹ So if the consistently upward direction of the adult incarceration graph after 1980 were the result of more crime, we should see a consistent rise in juvenile crime, with more youth involved in the drug culture. But the data show a notable drop in almost all categories of crime by American youth between 1980 and 2000.³²

28. WESTERN, *supra* note 1, at 39 fig.2.1.

29. *Id.*; see also FRANKLIN E. ZIMRING, *THE GREAT AMERICAN CRIME DECLINE* 49 fig.3.4 (2007) (showing the same trends from a normalized perspective, with 1975 levels set to 100).

30. ZIMRING & HAWKINS, *supra* note 6, at xii.

31. WESTERN, *supra* note 1, at 39.

32. *Id.* at 41 tbl.2.1.

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Obviously at *some* point more incarceration should reduce crime through deterrence or incapacitation.³³ While empirical findings have varied on this question, the consensus is that the contribution of prison to the recent crime reduction has been small. If we estimate the drop for serious crime at about 35% between 1993 and 2001, the research consensus is that about one-fifth of that crime reduction can be explained by the increase in the incarceration rate for that period.³⁴ Western joins but amends this consensus, again by an imaginative reference to juveniles. If we look to the whole period from 1980 to 2000, while adult imprisonment jumped 430%, juvenile incarceration jumped only about 50%.³⁵ Yet we have seen a drop in juvenile crime parallel to the adult drop.³⁶ Western concludes that absent formal changes in legal rules that would restrict juvenile prosecutions—and, if anything, the trend has been to lower the age for juveniles to be tried as adults—we should have seen a rise of juveniles in incarceration.³⁷

So perhaps the continuing incarceration boom has to be traced to deliberate policies or new practices, such as a dramatic shift toward incarceration rather than probation sentences for certain crimes; an increase in the length of prison sentences, driven both by formal legislation (including habitual-offender and mandatory-minimum laws); and a “dramatic increase in the prosecution and incarceration of drug offenders.”³⁸ Western does not say that lawmakers premeditated the increase in imprisonment.³⁹ These changes “did not require any

33. See RYAN S. KING ET AL., INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 6 (2005). Nevertheless, as discussed below, returns on incarceration ultimately diminish because after concentrating on the highest-rate offenders, the system will start incarcerating less potentially prolific ones. Furthermore, in the area of drug crimes, the key determinant of the crime rate may be the number of opportunities rather than the supply of malefactors. *Id.*

34. See *id.* at 4; ZIMRING, *supra* note 6, at 55; Rucker Johnson & Stephen Raphael, *How Much Crime Reduction Does the Marginal Prisoner Buy?*, 55 J.L. & ECON. (forthcoming 2012) (manuscript at 2), available at http://socrates.berkeley.edu/~ruckerj/johnson_raphael_crimeincarcJLE.pdf.

35. WESTERN, *supra* note 1, at 39–40.

36. *Id.* at 41 tbl.2.1 (noting declines in criminal activity among youths from 1980 to 2000).

37. *Id.* at 39–40 (arguing that because juvenile incarceration has only risen modestly, “[i]f we observe large declines in juvenile crime, as we have for adults, it is much less likely that these are explained by rising incarceration”).

38. *Id.* at 50.

39. See *id.* at 105. Western stresses that there are other discretionary stages along the way to prison at which greater punitiveness can occur. He notes that even where reports of crimes to the police declined, a higher percentage of arrests led to imprisonment. *Id.* at 43–44.

conspiracy on the part of policy makers.”⁴⁰ Rather, they were rooted in a variety of functional and expressive motivations that ultimately reflect either a willingness to tolerate or indifference to an increase in prison populations and the effects thereof.

As a corollary, note another important causal factor that needs consideration as one reviews Western’s picture of American incarceration: the inertia of the incarceration rate itself. The United States has actually proved capable of reducing its incarceration rate—it did so at least slightly in the 1970s, just before the major increase began.⁴¹ Even more remarkably, as he was becoming the leader of modern conservatism, then-Governor Ronald Reagan effected an amazing 34% decrease in California’s prison population, largely through more use of probation, more generous parole release, and far fewer parole revocations.⁴² Moreover, in the last few years budget crises and moral doubts over mandatory drug laws have led some states to declare truces on the political demagoguery over crime-related issues so that they could reduce their prison populations.⁴³ But the conventional view is that mass incarceration is here to stay indefinitely, for two primary reasons: First, as recent analyses of mass incarceration have shown, once incarceration reaches a critical mass, it is self-reinforcing by virtue of the criminogenic nature of the prison experience and the resilience of American criminal justice institutions in reabsorbing and recycling recidivists (so-called “net-widening”).⁴⁴ Second, even though drastic percentage reductions like the one under then-Governor Reagan in

In an important new paper, John Pfaff examines previously unused data to explain the sharp increase in imprisonment and concludes that the key cause lay with prosecutors in increasing felony filings per arrest, rather than increased arrests by police or longer sentences imposed by legislatures or judges. John Pfaff, *The Centrality of Prosecutors to Prison Growth: An Empirical Assessment* (Working Paper, 2011), available at <http://ssrn.com/abstract=1884674>.

40. WESTERN, *supra* note 1, at 105.

41. See Rosemary Gartner et al., *The Past as Prologue? Decarceration in California Then and Now*, 10 CRIMINOLOGY & PUB. POL’Y 291, 293 (2011).

42. *Id.* at 291, 292, 299.

43. See Marc Mauer, *State Sentencing Reforms: Is the “Get Tough” Era Coming to a Close?*, 15 FED. SENT’G REP. 50, 51–52 (2002); Robert Weisberg, *How Sentencing Commissions Turned Out to Be a Good Idea*, 12 BERKELEY J. CRIM. L. 179, 201 (2007).

44. On how parole revocation has become the new major source of prison admissions in California, see JOAN PETERSILIA, UNDERSTANDING CALIFORNIA CORRECTIONS 73–74 (2006). On the complexity and arbitrariness of factors that determine parole revocation and thereby confound any meaningful notion of recidivism, see James A. Wilson, *Bad Behavior or Bad Policy? An Examination of Tennessee Release Cohorts, 1993–2001*, 4 CRIMINOLOGY & PUB. POL’Y 485 (2005); and Sheila Royo Maxwell, Essay, *Rethinking the Broad Sweep of Recidivism: A Task for Evaluators*, 4 CRIMINOLOGY & PUB. POL’Y 519, 519–20 (2005).

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California have really happened, the absolute numbers imprisoned now are so large that an equivalent percentage decrease has become politically infeasible.⁴⁵

But if specific governmental policies were the immediate causes of the prison boom, what caused them to become our policies? The standard political story combines white populist backlash with the civil rights movement, the capture of the white South by the Republicans, Nixon's translation of working class resentment into law-and-order propaganda, and general disenchantment with the welfare programs established under Presidents Roosevelt, Kennedy, and Johnson.⁴⁶ But what of deeper structural and economic causes? In their famous 1939 account, Rusche and Kirchheimer surveyed European history from the Middle Ages on and inferred that imprisonment is the way a capitalist society deals with surplus labor in times of economic difficulty.⁴⁷ Imprisonment goes up to curb social threats of the idle poor, and down when those idle poor can be deployed in private production; imprisonment can also go up if prison labor can be productive, except if the unimprisoned poor then rebel against the competition—"if the prison does not underbid the slum in human misery, the slum will empty and the prison will fill."⁴⁸

While tempting to materially focused liberal theorists, the Rusche-Kirchheimer thesis is susceptible to charges of underestimating moral and political upheavals (such as "moral panic" and eruptions of fascism⁴⁹), or the effects of a shift to a modern service economy, or the differential economic effects of the varieties of sanctions (such as probation, which does not necessarily interfere with employment at all).⁵⁰ Worse yet, modern statistical studies, while somewhat confirming the short-term positive correlation of unemployment and imprisonment,

45. Gartner et al., *supra* note 42, at 314.

46. See *id.*; Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1246 (2005).

47. GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 50–51 (1939). This book was based on the famous earlier article by Georg Rusche, *Abreitsmarkt und Strafvollzug*, 2 ZEITSCHRIFT FÜR SOZIALFORSCHUNG 63 (1933) (Ger.), reprinted in 10 CRIME & SOC. JUST. 2 (Gerda Dinwiddie trans., 1978).

48. WESTERN, *supra* note 1, at 54 (quoting WEBB & SHAW, ENGLISH PRISONS UNDER LOCAL GOVERNMENT, at xi (1922)).

49. Theodore G. Chiricos & Miriam A. Delone, *Labor Surplus and Punishment: A Review and Assessment of Theory and Evidence*, 39 SOC. PROBS. 421, 425–26 (1992).

50. See Ivan Jankovic, *Labor Market and Imprisonment*, CRIME & SOC. JUST., Fall–Winter 1977, at 17, 18 (1977).

cast considerable doubt on an inverse relationship with lagging unemployment rates.

The legatees of Rusche–Kirchheimer include David Garland, who describes a brutal dialectic whereby the white middle class—overwhelmed by media depictions of increases in crime and related social disorders of drugs, sexual immorality, and political protests, fearing the opening of the labor force to women and minorities—is coopted by the low-tax, low-regulation Reagan–Thatcher neoliberalism into rejecting spending on social improvement and security and thus promoting harsh penalty as the sole worthy government program.⁵¹ Jonathan Simon adds to this theme that government learned—and taught private citizens and institutions—to deploy both the apparatus and public imagery of criminal law (i.e., “governing-through-crime”) to address anxiety about social disorder in school, the workplace, the housing project, even the suburban “community.”⁵² But these theories, speaking ominously of the deep, broad tropisms of late modernity, are often unclear about the strength and specific mechanisms of their favored determinants and risk devolving into that default, often tautological, category of “culture.”

As a corollary, comparativists pondering the anomaly of American incarceration have explored how differing such forms of modern social organization link to incarceration rates.⁵³ Neoliberal societies (e.g., the United States) have relatively weak labor unions, reject the pursuit of Japanese-style “industrial policies” linking public and private business planning, and offer relatively thin welfare programs.⁵⁴ “Corporatist” societies (e.g., Sweden) are more “organized” in the sense of establishing by custom, if not rule, close relationships among unions, government, social service nonprofits, official agencies, and trade groups. They are more generous in welfare, more regulated, and more committed to nurturing institutions of “so-called civil society.”⁵⁵ For John Sutton, incarceration rates correlate with the placement of a country along the spectrum from neoliberal to corporatist.⁵⁶ Extending Sutton in her recent book, *The Prisoners’ Dilemma*, Nicola Lacey

51. See GARLAND, *supra* note 13, at 85–87, 98–102 (2001).

52. See SIMON, *supra* note 14, at 3–13.

53. John R. Sutton, *The Political Economy of Imprisonment in Affluent Western Democracies, 1960–1990*, 69 AM. SOC. REV. 170 (2004) (analyzing effects of business cycles, political power, and the structure of labor market institutions stemming from differences between neoliberal and corporatist societies).

54. See *id.* at 176.

55. *Id.* at 175–76.

56. *Id.* at 172, 184–85.

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observes that more coordinated market economies—such as Germany—benefit from the discipline of coalition politics and proportional representation systems; their bureaucracies are both less politicized and less adversarial and so less vulnerable to the vagaries of demagoguery of American politicking over crime.⁵⁷

Western reviews and partly credits these factors. He affirms that the incarceration boom began as punitive legislation caused by conservative backlash against civil rights.⁵⁸ He also goes beyond the standard political story to test the correlation to penal policy of such ground-level factors as controlling political parties (the incarceration rate is 14% higher under Republican governors), urbanization, and the quantity of (and budgetary investment in) police officers.⁵⁹ But Western's special contribution concerns the relationship between imprisonment rates and the decline of the lower-level labor market for minorities.

First, controlling for certain state-level fixed effects, he finds that for the years 1980–2000, every 0.1% increase in a state's population of unemployed men under the age of forty-five who had completed high school but not college, was associated with a 2.3% increase in the incarceration rate.⁶⁰ “By 2001, the prison admission rate for all men, aged twenty to thirty-nine, would be 20[%] lower if the relative risk of imprisonment had not increased so much among high school dropouts.”⁶¹ Second, looking to income, Western finds that for all black and white men combined, a \$100 increase in weekly pay—roughly the increment attributable to a high school degree—“is associated with a 32[%] decline in the chances of imprisonment.”⁶² Between the mid-1980s and late 1990s, for blacks without a high school degree, a 7% employment decline created an 11% imprisonment rise, and the \$30-per-hour pay decrease they suffered between the mid-1990s and late 1990s is linked to an 8% rise in prison admissions.⁶³ Third, Western

57. NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* 72–73 (2008). For an argument that neoliberalism proves a powerful explanation for the form and scope of a nation's criminal justice system, see BERNARD E. HARCOURT, *THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER* (2011). For a critique that attacks the concept of neoliberalism as too broad and vague to supply sufficiently determined casual explanations, see James Q. Whitman, *The Free Market and the Prison*, 125 HARV. L. REV. 1212 (2012) (reviewing HARCOURT, *supra*).

58. WESTERN, *supra* note 1, at 59.

59. *Id.* at 69, 71–72.

60. *Id.* at 70.

61. *Id.* at 77.

62. *Id.* at 77–78.

63. *Id.* at 78.

finds a very strong negative correlation between liberal social welfare policy and the state incarceration rate, both across states and within states over the last few decades.⁶⁴

In sum, the best causal theory is that the number of men—in particular unschooled men—who will end up in prison increases as the number of men out of the labor force increases and economic support provided through welfare policies decreases.

Fourth, Western somewhat skeptically reviews the Rusche–Kirchheimer thesis, observing that the unemployment rate as conventionally measured fluctuates too much with macroeconomic conditions to yield any clear correlations with incarceration.⁶⁵ But he adds the nice twist that official unemployment statistics are a poor measure of joblessness because they exclude from the denominator the people who are unemployed because they are incarcerated.⁶⁶ With prisoners included, the jobless rates for young white (aged 22–30) males in 2000 increases from 10.6% to 12.0%, and the portion of all jobless who were incarcerated during the twenty years from 1980 to 2000, when the inmate population of young white males went from 90,000 to 185,000, increases from one-twentieth to one-eighth.⁶⁷ For “crime-age” black men (aged 22–35) without a high school degree, the jobless rate for 1980 jumps from 34% to 49%, and in 2000 from 41% to 65%.⁶⁸ The blunt inference from this reframing is that in 2000 a full two-thirds of the young adult jobless blacks without a high school degree were in prison—at the height of a major national economic expansion.⁶⁹

But perhaps Western wants to press the idea that the perception of economic hopelessness inspires jobless individuals to commit crimes; and, that potential offenders view the incarcerated jobless as confirmation of their fears and hence further motivation to commit crime in some long-run way that is not captured by directly matching

64. *Id.* at 66–73.

65. *Id.* at 67–68.

66. *Id.* at 94–95.

67. *Id.* at 89. More strikingly, for young male Hispanics, for whom the actual number of incarcerated people jumped from 25,000 to 130,000 between 1980 and 2000, the jobless rate jumps from 10.3% to 14.3% with the adjustment for those incarcerated, to the point that of this new expanded jobless group, 30% were incarcerated. *Id.* at 89–90. And most strikingly of all, for blacks, the jobless rate for young males in 1980 moves from 22.9% to 26.7% with the adjustment, while after two decades, when the actual incarcerated population of young black men rose from 110,000 to 285,000, the unadjusted jobless rate is 23.7% but the adjusted rate is 32.4%, so that one-third of young black jobless men were in prison. *Id.* at 90.

68. *Id.* at 91.

69. *Id.*

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employment and crime rates. Perhaps the causal implication of this adjustment is intended to be longer-term and even more tentative: That is, in jurisdictions where people get recycled in and out of prison, the difference between being jobless in and out of prison is ultimately unimportant, and these two forms of joblessness are equally self-reinforcing in terms of perpetual joblessness and poverty, and work together to produce future imprisonment. Western wants to underscore the potentially reinforcing nature of joblessness by increasing the number who will find it hard to get back into the labor pool and perhaps to leave seeds of thought about how incarceration will always feedback on itself.

Thus, Western may be willing to take advantage of whatever resonances might arise in the minds of readers as to how a remeasured jobless proportion of society helps explain the perpetuation of prison, without directly focusing on the intermediation of a rise in the crime rate. And indeed *Punishment and Inequality* is certainly open to the criticism that it slips and slides among confident and more tentative causal linkages as well as mere “associations” and correlations that intrigue and disturb but have no necessary causal significance. At times Western uses loose language about these correlations, such as saying that “[c]lass inequality in imprisonment increased dramatically from 1983 to 2001, contributing about 20[%] to the rise in risk of prison admission.”⁷⁰ And sometimes his causal hints are stronger: “[Thus,] a central implication of labor market theories of incarceration [is that] economic inequality expands criminal punishment among the disadvantaged by increasing inequality in incarceration.”⁷¹ He observes that “[t]he rise in the risk of imprisonment among less-educated men may be related to trends in their earnings and employment.”⁷² And he attacks traditional research that “offered little suggestion that the prison boom was fueled by the poor job prospects of less-skilled blacks.”⁷³

But consider this statement by Western, about recent American history: “Missing, perhaps, some social supports of the European kind, violence, disorder and idleness flourished in America’s ghettos, creating for government not just an economic problem, but a problem of social control.”⁷⁴ If it vaguely smacks of the leftist social theory approaches of Garland and Simon, Western may indeed be tempting us to consider

70. *Id.* at 78–79.

71. *Id.* at 73.

72. *Id.* at 77.

73. *Id.* at 78.

74. *Id.* at 105.

these left-social-theory treatments of modern imprisonment. Indeed, he may even be partly resurrecting the Rusche–Kirchheimer thesis, even if he is wary of committing to its empirical claims.

Regardless of whether Western intends some kind of homage to Rusche–Kirchheimer, his real goals are surely moral, political, and rhetorical. He wants us to be embarrassed by the economic context and consequences of the imprisonment rate. He sums this up by saying that the hidden great numbers of prison inmates “occupy a shadowy status that affects a variety of official statistics that record the economic well-being of the population,” and that “[t]he prison boom makes a new contribution to the invisibility of the poor.”⁷⁵ A Marxist or a highly instrumental promoter of the Rusche–Kirchheimer view might argue that whatever forces might motivate the powerful to want to increase economic inequality or render the poor invisible, prison is a way of doing this, but Western’s story reads more like one of reckless indifference. The incarcerated are invisible and therefore we do not observe the powerful engine of future economic misery it operates.

Western eyes, in particular, the common misleading narrative of the last decade of the twentieth century as a period of economic boom, which greatly reduced the income gap between whites and blacks. But as Western shows, just as the official figures distort the picture of joblessness, they distort the wage distribution.⁷⁶ From the mid-1980s to the late 1990s, the wage gap (for hourly wages) between whites and blacks went up slightly to a peak in 1985 and then dipped somewhat.⁷⁷ Further, even though a Democrat was President for most of the decade, the somewhat Panglossian retelling of the 1990s includes the welfare reforms credited with enhancing and demonstrating the power of a limited government, laissez-faire economy that contrasted with the weaker performance of European economies. To this, Western demurs: “The government, rather than withdrawing from the lives of young disadvantaged blacks, significantly increased its role. Lawmakers who, in other contexts, would celebrate the value of limited government and free markets, adopted policies that massively and coercively regulated

75. *Id.* at 87.

76. *Id.* at 97.

77. *Id.* at 98–99 & fig.4.5. Western acknowledges and allows for the fact that the people headed into prison at any point those years were making 80% of the wages of those not headed to prison. But even taking that into account, the effect of including the jailed population indicates that the shrinkage in the wage gap was much less than the official numbers. *Id.* at 100–02.

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the poor.”⁷⁸ Western wants to fight the naïve or disingenuous puzzlement some have expressed about how imprisonment could rise in such a time of prosperity, a view that reinforces the tendency to disentangle imprisonment from economic factors and also might induce overestimation of the link between crime rates and imprisonment or of the credit that prison deserves for the 1990s crime reduction. The imagery of widespread economic success either leads Americans to ignore the prison boom altogether, or to shrug at it as beyond any explanation—as some odd disconnected fact that might trace to the unfortunate, incurable presence of malevolent individuals.⁷⁹ In fact, he wants to challenge any national self-congratulation about the civil rights movement because invisible mass incarceration is a form of residential segregation, so that by virtue of imprisonment, “the invisibility of today’s poor remains rooted in the physical and social distance between whites and blacks.”⁸⁰

One more causal explanation emanating from social theory is worth mentioning: Americans’ belief in our own uniqueness or, to use the recurring cliché, exceptionalism. “The notion of American uniqueness or exceptionalism is traditionally traced to Puritan conceptions of a new world, created out of virgin territory and charged with special spiritual and political destiny.”⁸¹ This exceptionalist thinking has shaped many fields of inquiry and social practices, including crime. For many decades now, a settled notion among both Americans and Europeans has been that the United States has an anomalously high rate of violent—and especially lethal—crime.⁸² While it is difficult to establish actual American crime rates before roughly the 1930s, it is even more difficult

78. *Id.* at 105.

79. At the risk of sentimentality, Western would like us to recur a bit to the Great Depression, when there was relative solidarity in economic misery, and when we were more open to believing in structural explanations for social misery. *See id.* at 86–87. He therefore also wants us to recur to the spirit of Harrington’s 1962 *The Other America* and its moral achievement in embarrassing the United States into taking poverty seriously. *Id.* at 85–86.

80. *Id.* at 86.

81. *See* Weisberg, *supra* note 3, at 9.

This destiny evolves from a religious self-conception into a secular one. Along the way, our exceptional sense of self can become a very brutal thing leading us to assimilate or eliminate native peoples in the name of destiny though, as some have observed, our special American sense of self allows us to accept or justify violence by a claim that in our secular theology violence can and must have a high moral purpose to be redeemed.

Id.

82. ZIMRING & HAWKINS, *supra* note 3, at 3.

to trust figures from other nations; this perception is likely accurate—at least for violent crime.⁸³ There are a number of sociological and cultural explanations for America's crime exceptionalism, including the power of the frontier and individualism in our mythic self-conception, as well as history and consequences of slavery and, to a lesser extent, late-nineteenth-century immigration.⁸⁴

IV. THE CONSEQUENCES OF THE INCARCERATION BOOM

Much of the commentary on mass incarceration alludes to the costs associated with harm to families and neighborhoods—costs that are real but impossible to measure well. Western aims at a more measurable harm—the direct effect of imprisonment on prisoners' future employment and income.

Controlling for the pre-imprisonment personal factors that would themselves reduce job and money prospects, Western isolates the "Aggregate Earnings Penalty" (AEP)—the decrease in future earnings attributable solely to past incarceration.⁸⁵ Western infers that a post-prison offender will suffer a 30%–40% reduction in annual income, and if released in his early twenties, he will enjoy no real wage growth whatsoever between the ages of 25 and 35.⁸⁶ In absolute numbers, imprisonment will, on average, cost him around \$100,000 over his lifetime (ironically, the amount is highest for whites, because their base pay is higher on average).⁸⁷ These findings resonate with those of sociologist Devah Pager, who staged employment interviews by sending in pairs of testers objectively identical except for the former incarceration status of one, with a sufficient racial mix to isolate racial discrimination.⁸⁸ Pager concluded that (wholly apart from all the individual factors that would have predicted inmate status) incarceration

83. *Id.* at 7.

84. See Weisberg, *supra* note 3, at 21, 29, 43. Of course the problem now is that American crime rates have increasingly converged with those in Europe, so that the focus on crime exceptionalism has to be more on homicide than crime generally, and even there the gap is narrowing. ZIMRING & HAWKINS, *supra* note 3, at 51. But however thematically crime and imprisonment are related, whatever the cultural relation there is between being brutal to each other and our government being brutal to us, the problem is not the crime anomaly but the prison anomaly, and for that issue the standard exceptionalism theories, themes, and explanations offer less help.

85. WESTERN, *supra* note 1, at 125–26.

86. *Id.*

87. *Id.*

88. DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION, at viii (2007).

of white applicants reduced the “callback” percentage from 34% to 17%; for blacks, from 14% to 5%.⁸⁹ Western also found that the AEP was at least related to other bad social outcomes post-prison: increased domestic violence, increased rupture of existing marital or other domestic partnership arrangements (in part because of increased domestic violence), and possibly reduced future marriageability as well.⁹⁰ The disconnected, erratic personal lives of ex-prisoners makes them much more likely to recidivate and—depending on parole revocation rules—more likely to reenter prison cyclically. In short, mass incarceration has itself produced a new and massive underclass, disproportionately made up of racial minorities.⁹¹

Given the picture that emerges from the work of Western and others, it does not seem hyperbolic to suggest the United States has lost the moral authority to impose retributive punishment and lacks the intellectual and political authority to claim any cost-benefit rationality in carrying out any welfare-enhancing goals of incarceration. At the very least, it suggests that punishment theorists have a moral obligation to reconsider theoretical commitments in light of the grim social reality that punishment itself has helped bring about.

V. JUSTIFICATIONS FOR PUNISHMENT RECONSIDERED

According to a stock story, a revival of retributivism,⁹² in a mutually reinforcing relationship with a legislative movement toward more rigid and harsher sentences,⁹³ has driven the last two decades of punishment

89. *Id.* at 90–91 & fig.5.1.

90. WESTERN, *supra* note 1, at 131–63.

91. For the argument that mass incarceration has created a demimonde of people not so much comprising a distinct status but rather as lacking in *any* political or social status, see Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY 96, 97–99 (Charles J. Ogletree, Jr. & Austin Sarat eds., forthcoming 2012) (citing theorist Giorgio Agamben for the notion of a “bare life,” GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE 12 (Daniel Heller-Roazen trans., 1998)).

92. Russell Christopher collects some of the proclamatory verbiage, including “rise,” “resurgence,” and “renaissance,” and also helpfully reviews some of the key scholarship in this revival as well as some of the commonly cited explanations for it. Christopher, *supra* note 4, at 845–46 & nn.2–5. While public discourse about punishment often relies on the rhetoric of retributivism, much of the new sentencing legislation is probably better explained by an angry devotion to incapacitation, especially in terms of “three strikes” and other habitual offender laws. Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 36, 39 (2004). The blurring of the two is also discussed below in regard to Zimring and Hawkins’ book on incapacitation, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME (1995). See *infra* Part V.A.4.a.

93. Michael M. O’Hear, *The Original Intent of Uniformity in Federal Sentencing*, 74 U.

jurisprudence. The story focuses on the mid-century failures of discretionary sentencing against the once-strong, science-grounded promise of rehabilitation. Promoters spanned the political spectrum, with different but converging motives: conservatives denounced rehabilitation for excessive leniency and for naïve sentimentality regarding the malleability of the individual; civil libertarians denounced it for authorizing excessive sentences capriciously disparate while unrelated to moral desert.⁹⁴ In the 1960s, the new retributivism started. The reversal was so complete that prominent academics like Albert Alschuler expressed self-critical disbelief that they could ever have fallen for so bizarre a notion as indeterminate sentencing rooted in utilitarian theories.⁹⁵

Tonry's introduction to *Why Punish? How Much?* is a wise commentary on the "fashions" of punishment theory, and it amends the stock story.⁹⁶ Tonry cautions that fashions change, and that even short-term phases of change are often equivocal.⁹⁷ Thus, to say that retributivism dominates criminal justice today would be an overstatement. A more accurate characterization might be that we are in an uncertain period in which one major factor has been a strand of retributivism that incorporates mitigation in the gentle utilitarianism of restorative and therapeutic justice.⁹⁸

For Tonry, the American system of criminal justice—with its prisons, parole boards, juvenile courts, and probation officers—is a mid- to late-nineteenth century construct driven by unabashedly utilitarian motivations.⁹⁹ Tonry's creation story describes an era when academic commentary greatly influenced policy toward indeterminate sentencing as an instrument for tailoring salutary moral education to the needs of individual miscreants.¹⁰⁰ Indeed, officials and scholars of that era prided

CIN. L. REV. 749, 784 (2006).

94. Weisberg, *supra* note 43, at 183–84.

95. Albert W. Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550, 552 (1978).

96. Tonry, *Introduction*, *supra* note 5, at 3, 7.

97. *Id.* at 7.

98. *Id.* at 23–24.

99. *Id.* at 3.

100. *See id.* at 14–15. "Indeterminate" and "determinate" sentencing are ambiguous terms. That is, Americans sentencing at mid-century had generally taken the form of broad ranges from which a trial judge could select a sentence followed by discretionary parole, so the judge's decision was unstructured and the ultimate length of time served was undetermined at time of sentencing. The modern turn to determinacy surely reflects new punitive attitudes in the United States, but as one leading commentator, Kevin Reitz, has

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themselves that a high rate of incarceration signaled commitment to reforming the misguided.¹⁰¹

Late-Victorian utilitarianism remained dominant well into the twentieth century. Consider the 1950s' original Model Penal Code (MPC): Although the part of the MPC that law students know best is its culpability taxonomy of mental states reflecting moral desert, MPC godfathers Jerome Michael and Herbert Wechsler dismissed retributive justice as nonsense. Michael and Wechsler proclaimed that the legal art and science of rehabilitative and indeterminate sentencing stands unopposed as the spirit of modern criminal law.¹⁰² They found allies in such academic endeavors as criminologist Sheldon Glueck's idea for actual sentencing power to be vested in a "Socio-Penal Commission" consisting of neutral medical and academic experts.¹⁰³

Tonry collects classics from Bentham, Kant, and Hegel with modern contributions from retributivists Andrew von Hirsch and Norval Morris, social theories of Foucault and Loci Wacquant rooted in Marxism, and defenses of restorative and therapeutic justice. But the recent theorists worry most about how to maintain their own coherence and differentiation; their feints against fact-based challenges are chiefly rhetorical flourishes or abstract gestures meant to appeal to intellectualism. But with Tonry's admonitions in mind, the real story of modern punishment jurisprudence is not just the rise of any one school but an insularity whereby theorists worry mostly about their own internal coherence or about their conceptual differentiation from others' theories; theorists' feints in the direction of fact-based challenges to their theories are chiefly rhetorical or abstract gestures meant to shore up claims of internal coherence. Moreover, their attempts to proffer justifying or even explanatory theories of punishment prove orthogonal to the key social, political, and economic questions about mass incarceration and deserve major emphasis. Retributivism is the best example.

pointed out, highly structured sentencing by itself is neutral as to punitiveness in terms of a bias away from probation toward prison or the length of sentences. Kevin R. Reitz, *Don't Blame Determinacy: U.S. Incarceration Growth Has Been Driven by Other Forces*, 84 TEX. L. REV. 1787, 1798–99 & fig.3 (2006).

101. Tonry, *Introduction*, *supra* note 5, at 11–12.

102. *See id.* at 4, 16–18.

103. Sheldon Glueck, *Principles of a Rational Penal Code*, 41 HARV. L. REV. 453, 476 (1928), *reprinted in* SHELDON GLUECK, *CRIME AND CORRECTION: SELECTED PAPERS* 72, 95 (1952).

A. Retribution and Retributivism

It is too categorical to say that retributivists have ignored the real world of imprisonment. They have, if anything, struggled to accommodate worldly realities, but have done so in insular, abstract, and incomplete ways that smack more of concern for intellectual nuance and rigor than moral accountability for the social effects of a retributivist system. They have failed to acknowledge, much less meet, the challenge that the mass-incarceration books declare—a challenge that requires a much deeper rethinking of what role jurisprudence should play and has played.

1. Flavors of Contemporary Retributivism

The recent voices of retributivism have been markedly varied. There are the avowed political conservatives like Ernest van den Haag, who almost vindictively denounces rehabilitation as feckless, invoking (or purporting to invoke) pure deontological concerns as a moral catharsis for a misguided liberal moral relativism.¹⁰⁴ There have been the strong but more nuanced and nonpolemical voices of retributivism such as Michael Moore, who has worked to reconcile retributivism with the principle known as moral realism by tying the supposed deontological notion of moral desert with a kind of naturalist human psychology.¹⁰⁵ There have been liberal versions of retributivism that embrace it as an antidote to modern instrumental economic thinking. These include Dan Markel (whose “Confrontational Conception of Retribution” promotes retributivism in service to his professed political ideals of “moral accountability for unlawful actions; . . . equal liberty under law; and . . . democratic self-defense”)¹⁰⁶ and Antony Duff (whose liberal communitarian version of retributivism aims to induce repentance and reconciliation).¹⁰⁷ Also prominent among these liberal

104. Ernest van den Haag, *The Death Penalty Once More*, 18 U.C. DAVIS L. REV. 957, 967–72 (1985). Consider this example: “Human beings are human because they can be held responsible, as animals cannot be. In that Kantian sense the death penalty is a symbolic affirmation of the humanity of both victim and murderer.” *Id.* at 972.

105. See generally MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* (1997). For an argument that Moore struggles unsuccessfully to reconcile his strong view of retributivism with the deterministic implications of naturalism, see Thomas W. Clark, *Against Retribution*, 3 HUM. NATURE REV. 466 (2003) (reviewing MOORE, *supra*).

106. Dan Markel, *State, Be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty*, 40 HARV. C.R.-C.L. L. REV. 407, 426–27 (2005).

107. R.A. DUFF, *PUNISHMENT, COMMUNICATION, AND COMMUNITY*, at xviii (2001).

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and nonpolemical retributivists are those like Herbert Morris,¹⁰⁸ who offer notions of retribution tied to somewhat Rawlsian notions of fairness; others offer contractarian theories of government,¹⁰⁹ or, like Joel Feinberg, argue that retributivism serves a function of reinforcing the moral solidarity of society.¹¹⁰

In all its forms, the revival of retributivism has entailed a recommitment to deontological values that put individual responsibility at the moral center of criminal law. But a consistent problem with those purporting to invoke deontological retributivism is that they often lack the courage of full deontology, and, as I will suggest below, the current state of retributivist scholarship is all about the degree of consequentialism that retributivism should incorporate. One of the central figures of retributivism, Michael Moore, strongly declares that we have a duty to punish according to retributivist principles,¹¹¹ and yet he regularly issues key qualifiers to the notion that desert is a sufficient condition for punishment:

Within the set of conditions constituting intelligible reasons to punish, the retributivist asserts, desert is sufficient, i.e., no other of these conditions is necessary. Of course other conditions outside the set of conditions constituting intelligible reasons to punish may also be necessary to a just punishment, such as the condition that the punishment not violate any non-forfeited rights of an offender.¹¹²

Thus, Moore has been described as a “threshold deontologist,” i.e., he would allow the deontic duty to punish to yield to some variance

108. See HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS IN LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 32 (1976).

109. See MICHAEL DAVIS, TO MAKE THE PUNISHMENT FIT THE CRIME: ESSAYS IN THE THEORY OF CRIMINAL JUSTICE 7–9 (1992).

110. JOEL FEINBERG, DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 98–105 (1970). An interesting theme in retributivism that has produced some very thoughtful commentary recently is the issue of “subjectivism.” This concept considers whether adjusting punishments to the likely degree or pain that a particular individual or type of person will experience is a fairer way of ensuring desert than an objective approach. For a fine treatment, see Adam J. Kolber, Essay, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009). I would immunize this work from the charge of ignoring mass incarceration because it honestly operates at a rarefied level of moral philosophy.

111. MOORE, *supra* note 105, at 91 (asserting that moral desert is both a necessary and sufficient basis for punishment).

112. *Id.* at 173 (emphasis omitted).

based on the moral gravity of the offense or the magnitude of countervailing factors.¹¹³ In a somewhat different vein is the highly influential retributivist Andrew von Hirsch. Usually a harsh polemicist committed to debunking what he considers the laughable flaws of utilitarian rationales for punishment, von Hirsch sometimes adopts a defensive tone in arguing for ease of administration as a key comparative virtue of retributivism.¹¹⁴ Indeed, von Hirsch reveals an intellectual anxiety common to even strong retributivists by avoiding references to “retribution” in favor of “desert.”¹¹⁵

In this regard, von Hirsch somewhat aligns with Paul Robinson and John Darley, who acknowledge the impossibility of retributivism as a purely desert-focused basis for determining the proper punishment for an act but insist that common moral intuition at least supplies a reliable metric for the ordinal measurement of punishment. Moreover, they argue that obeying consensus moral instincts has the great instrumental value of encouraging respect for the criminal law—something the authors somewhat awkwardly tie to a refined version of general deterrence.¹¹⁶

113. See Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 850 & n.96 (2007).

114. See generally ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976). Von Hirsch concedes that sometimes retribution leads to shorter sentences than were frequent in the 1970s, but he insists that the solution to equating punishment and desert and to economizing on prison costs is a literal and public inflection of pain. Thus, he argues that pain is a necessary condition of justice and denies such liberal shibboleths as the idea that the prisoner has right of integrity over his own body. See *id.*; see also GRAEME NEWMAN, *JUST AND PAINFUL: A CASE FOR CORPORAL PUNISHMENT OF CRIMINALS* 19, 33 (2d ed. 1995) (explaining von Hirsch’s arguments and the “confusion about the use of pain in criminal punishment”).

115. VON HIRSCH, *supra* note 114, at 45–46.

116. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997). Robinson and Darley state:

In fact, in a society as diverse as ours, the criminal law may be the only society-wide mechanism that transcends cultural and ethnic differences. . . .

. . . If it earns a reputation as a reliable statement of what the community, given sufficient information and time to reflect, would perceive as condemnable, people are more likely to defer to its commands as morally authoritative and as appropriate to follow in those borderline cases in which the propriety of certain conduct is unsettled or ambiguous in the mind of the actor.

Id.; see also John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 676 (2000) (finding that sentencing intuitions of the public focus on just deserts). Robinson has suggested that there are actually three major types of retributivism, or “desert.” In addition to “empirical desert” there is “vengeful desert,” which aligns punishment with the amount of harm the offender causes, and “deontological desert,” where punishment is determined by the absolute degree of the moral wrongfulness of the

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If von Hirsch's threshold model suggests a somewhat ambivalent commitment to retributivism, the Robinson–Darley approach raises more serious problems. At first glance it is an effort to salvage retributivism from charges of hyper-abstraction by rooting moral views in popular consensus, or, more modestly, a search for some reliable benchmark for otherwise elusive deontological judgments. But their work exemplifies how retributivism purports to accommodate or confront social reality while mostly appropriating a small part of that reality for purposes of internal rationalization. And in that regard, note its strange acknowledgment of endogeneity. Criminal law will be more efficacious if the populace finds its moral views reflected in the penal system. But the endogeneity runs deeper than they acknowledge, since their approach invites democratic populism to endorse any current system as retributively just and thereby promote its continual self-reinforcement.

Perhaps the most important contemporary example of ambivalent retributivism is the so-called “limiting retributivism” associated with Norval Morris¹¹⁷ and which has also been called “hybrid retributivism.” This concept is often traced to H.L.A. Hart's distinction between retributivism as a general justification for punishment and retributivism as method of distributing punishment,¹¹⁸ with the acceptance of the former and rejection of the latter. Hence retributivism becomes a necessary but insufficient condition for punishment of individuals, and an eclectic reliance on consequences of punishment can help determine the right sanction under the maximum permitted by the retributivist measure. This limiting retributivism has become what might be described as the politically correct version of retributivism, the liberal shibboleth relied on by the new *Model Penal Code of Sentencing*.¹¹⁹ In his rationale for the new MPC, reporter Kevin Reitz laments the failures of incapacitation and rehabilitation and declares the need to accommodate retribution, because in recent years even

retributive theory has advanced far in both application and acceptance. Reflection suggests that moral bases for punishment

offense. Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 146–50 (2008).

117. See NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* (1974).

118. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 9 (1968).

119. Kevin R. Reitz, *American Law Institute, Model Penal Code: Sentencing, Plan for Revision*, 6 BUFF. CRIM. L. REV. 525, 528 (2002) (invoking Norval Morris's idea of retributivism supplying upper and lower limits for a particular crime).

will be present in any punishment system administered by human beings, and such impulses can hardly be eradicated through legislation. Indeed, some theorists posit that retribution is an affirmative, morally-required foundation for criminal sanctions.¹²⁰

As Reitz lays it out, one of limiting retributivism's chief benefits is that it suggests a proportional ordering of severity; within the retributivist range, "utilitarian goals such as rehabilitation and incapacitation may be given rein to operate."¹²¹ Reitz's language seems to emphasize the retributivist rationale and treat consequentialist concerns as subordinate qualifiers. But in concept, if threshold retributivism presumptively relies on desert (but qualifies it to account for certain consequences), the MPC's retributivism points in an almost opposite direction.¹²²

2. The Standard Criticisms

The resurgence of retributivism in legal academy has (not surprisingly) provoked spirited challenges to its premises and implications. These challenges are powerful, and yet, with barely any exceptions,¹²³ even when they attack retributivism for disconnection from social reality they acquiesce in a narrow view of that social reality so as to ignore mass incarceration.

Of the traditional attacks on retributivism, some have argued that retributivists are fatally ambiguous or evasive about what exactly retributivism purports to be and to do: whether it is a strictly moral concept or a designedly legal concept; whether it is mandatory or permissive; whether it is meant to guide the level of punishment inflicted or just provide a foundational moral justification for the very existence of the practice of punishment; and whether it justifies limits on an otherwise utilitarian deployment of punishment or instead is just a one-way ratchet to justify harsher penalties than society might choose on utilitarian or other grounds.¹²⁴ Others have focused on why it is logically

120. *Id.* at 555–56 (footnote omitted).

121. *Id.* at 556.

122. See Cahill, *supra* note 113, at 836 (arguing that retributivism should be the justification for punishment, constrained by utilitarian limits, whereas the *Model Penal Code* looks to retributivism as a limit on consequentialist goals).

123. *But see infra* notes 171–174 (discussing Edward Rubin's views on limiting retributivism).

124. See Christopher, *supra* note 4, at 865–67.

impossible to achieve because of two major social facts: the scarcity of governmental resources and the fallibility of human judgment.

The modern classic of criticism in this genre is David Dolinko's *Three Mistakes of Retributivism*.¹²⁵ Dolinko begins by laying out the retributivists' claim to moral advantage over proponents of instrumental punishment theories: that retributivism gives offenders exactly the punishment they "deserve" for their wrongful deeds, and hence never "uses" them, in a Kantian sense, by punishing them more than they deserve in order to serve some other social end.¹²⁶ That claim, Dolinko argues, rests on three fundamental errors. The first is the failure to see that retributivism itself "uses" individuals in precisely the same way, when it deploys concrete systems of punishment knowing that they are fallible, and therefore knowingly accepting the occasional punishment of the innocent in order to ensure that the guilty get what they deserve.¹²⁷ The second is the belief that we can come up with some objective measure of "just deserts" that allows us to match the punishment perfectly to the crime.¹²⁸ As Dolinko shows, the purportedly objective scales of "desert" that retributivists have come up with are wholly circular or dependent on positive criminal law policy that itself cannot meet the test of perfect objectivity.¹²⁹ The third is the belief that in giving individuals the punishment they "deserve," we are expressing respect for them in a Kantian sense.¹³⁰ To put it differently, we *disrespect* persons when we take into account various mitigating factors in setting the level of punishment or seek to advance rehabilitative goals, because we thereby assume that the criminal is not a fully autonomous individual responsible for his own choices and actions.¹³¹

To be sure, there are some defenses of retributivism that might seem to finesse these question altogether. One is to say that retributivism is inherently conceived solely to determine the proper sanction for individuals, not for wholesale classes of offenders.¹³² But that definitional defense seems more descriptive than normative, and hence fecklessly evasive. A related defense is to ascribe deontic duties to

125. David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623 (1992).

126. *Id.* at 1624–25, 1627, 1630.

127. *Id.* at 1632.

128. *Id.* at 1635–36.

129. *See id.* at 1637–38; *see also* H.L.A. HART, *supra* note 118, at 233.

130. *See* Dolinko, *supra* note 125, at 1642.

131. *Id.* at 1642–43.

132. *See* Cahill, *supra* note 113, at 819 & n.13 (summarizing views that the standard method of most retributivists is to rely on contrived hypotheticals to test their rationales).

different stages of a system. Thus, Michael Moore himself posits that we can define deontic duty as only governing intentional actions in regard to punishment, and not be responsible for unintentional, even foreseeable, outcomes.¹³³ Thus, a government system can justify its criminal justice system on a general deontic basis; it can also expect system actors making individual and situational decisions (police or judges) to follow deontic duty; but it can immunize from deontic duty the designers of institutional subsystems because they have to take account of resource constraints.¹³⁴ But these efforts by retributivists to find a harmonious relationship with consequentialism, at least when done at this level of abstraction, have provoked one wise critic, Mitchell Berman, to suggest that retributivists in effect “get over it” by accepting the pointlessness of any distinction in the first place.¹³⁵ Berman instead suggests a modest but more workable distinction among degrees and forms of retributivist acquiescence in instrumentalism.¹³⁶

3. Retributivism and the Economists

Much of the recent criticism, and self-criticism, of the retributivist revival has involved discussion of whether retributivism can find any possible harmony with the law-and-economics movement—a movement inclined to stress deterrence as the logical purpose of the criminal sanction. Richard Posner and other law-and-economics scholars have generally dismissed retributivism in derogatory terms, as if those with a

133. Michael S. Moore, *Four Reflections on Law and Morality*, 48 WM. & MARY L. REV. 1523, 1552 & n.79 (2007).

134. *Id.* “Choice sets” of institutional designers who must allocate scarce resources fall outside the scope of deontic obligations. *Id.*

135. See Mitchell N. Berman, *Two Kinds of Retributivism*, in PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 433, 434 (R.A. Duff & Stuart P. Green eds., 2011). Berman argues that almost any supposedly deontic value can be recharacterized in terms of its instrumental value. *Id.* at 442 & n.24. Berman focuses on Moore’s and others’ promotion of retributivism or desert as “an intrinsic good” and then notes that they could not possibly believe that deontological value is the *only* intrinsic good, else the overall virtue of any state of affairs would equal the amount of punishment of guilt that occurs, regardless of other social virtues. *Id.* at 439.

136. Berman concludes as follows:

The worry, then, is not that the divide between ‘retributivist instrumentalism’ and ‘non-retributivist instrumentalism’ is false, but that it is arbitrary. If we were disposed to draw a binary classification within instrumentalist theories of punishment, we could just as well do it between welfarist and non-welfarist instrumentalism or deontological and non-deontological instrumentalism.

Id. at 443.

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utilitarian approach to the world find it an alien life-form.¹³⁷ Although he has, perhaps begrudgingly, considered the idea of the taste for retribution as a revealed preference that can be factored into utility,¹³⁸ Posner has mostly argued that any concern for moral desert produces results sharply at odds with rational efforts to reduce crime—sometimes over-punishing and sometimes underpunishing.¹³⁹

Now a new strand of law-and-economics has considered the possibility that retributivism can win harmony with the constraining force of social fact. I will briefly review some of the variations within this movement. But to telegraph my punch on this development: the key factor this approach looks to is indeed *constraint*—but it is a misapprehended or even fictitious notion of constraint—the supposed constraint of limited resources in our political economy to punish in proportion to the degree of deserved punishment. This constraint has a corollary in the new law-and-economics approach to retribution—the institutional imperfections and agency costs in the systems of investigation and adjudication might also contribute to underpunishment. And I argue that if we accept Bruce Western’s and others’ findings about mass incarceration, these allusions to social fact have become tragically beside the point.

We can start with the most optimistic, even Panglossian, approach—that of Donald Wittman.¹⁴⁰ Wittman implicitly calls on retributivists to realize that they cannot have all that they want, but he still argues that they can adjust to the real world by sensibly optimizing in the face of these limitations. The premise is simply that retribution is a good thing and thus can be optimized like any other good thing, so that limitations on its availability are no more of a sacrifice than is true of any other

137. Posner addressed retributivism in a 1980 article, characterizing it as immoral and irrational, or at least as primitive and nonrational. See Richard A. Posner, *Retribution and Related Concepts of Punishment*, 9 J. LEGAL STUD. 71, 80–81 (1980). He does endorse its social function in primitive and early societies, in which it may temper the desire of private acts of vengeance, but dismisses its usefulness in modern societies, in which the function of law enforcement is assumed by the state. *Id.* at 75–76. Louis Kaplow and Steven Shavell, in their treatise promoting a purely welfarist purpose for legal decision-making, condemn retributivism as fundamentally unfair. LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 3, 9 (2002).

138. Some legal economists have been more willing than Posner to accept a taste for retribution as a significant and independent factor in the utilitarian calculus. See Alvin K. Klevorick, *Legal Theory and the Economic Analysis of Torts and Crimes*, 85 COLUM. L. REV. 905, 919 (1985).

139. See Posner, *supra* note 137, at 82 (describing a system of punishment based on retaliation and vengeance).

140. Donald Wittman, *Punishment as Retribution*, in 4 THEORY & DECISION 209 (1974).

social good. Wittman takes retributivism as calling for punishment as close to the fully deserved sanction-per-bad-act as possible, so that full punishment is “optimal.”¹⁴¹ But generally recognizing the limited resources and imperfections of the criminal justice system, including erroneous judgments and agency costs among institutional actors, he assumes that there is an exogenously determined fitting punishment for each crime, so that punishing all offenders at this level maximizes justice.¹⁴²

Consider the terms in which this bridging effort is attempted: Wittman is explicitly indifferent to the means by which the degree of punishment that meets retributive standards is determined.¹⁴³ He then establishes a utility function whereby justice declines as punishment exceeds or falls short of this level, and his model analyzes the comparative degrees of injustice traceable to these deviations, whether over or underpunishing, or failing to punish all criminals, or punishing the innocent.¹⁴⁴ In effect, he writes a guide for how the rational retributivist should act. At the most general level, if punishment is just, then the more individuals that are punished the less justice there is.¹⁴⁵ But over or underpunishment for the relevant crime in terms of severity and degrees of failure to punish the guilty all affect our efforts to maximize justice. Thus, if a punishment is egregiously severe, then there is more justice when fewer are punished.¹⁴⁶ He accepts the “slack” of the system because of the inefficiencies caused by multiple agents in the process, and it increases as actual punishment goes down.¹⁴⁷ In summary, if punishment is too big, as it increases it lowers the optimal

141. *Id.* at 211–12.

142. *Id.* at 215.

143. *Id.* at 211.

144. *Id.* at 210–26.

145. *Id.* at 218.

146. *Id.*

147. *Id.* at 215–16. In more detail, “[i]f the punishment is less than the optimal . . . , the smaller the punishment the less the difference in justice between punishing many and a few of [the guilty].” *Id.* at 215. But, “[i]f punishment is less than . . . [optimal], then the more . . . punished, the greater the justice.” *Id.* at 216. “If the punishment is greater than [deserved], the greater the punishment, the greater the justice of punishing a few of the known criminals minus the justice of punishing many of them.” *Id.* at 218. So “as punishment increases [above optimal], the optimal number of criminals not punished increases.” *Id.* Wittman even cites some empirical evidence: When Virginia arguably overpunished drunk driving with a mandatory loss of license, the result was jury nullification. *Id.* By contrast, he predicts that in states that reduce marijuana possession from a felony to a misdemeanor, thereby adjusting the punishment to what is perceived as deserved, the conviction rate will go up. *Id.*

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number of those punished, and when fewer of the known criminals are punished, the less the optimal punishment.¹⁴⁸

While most retributivists (and deontologists in general) would be uncomfortable with the idea of even a vague “measure” of justice, Wittman’s approach, if extended modestly, would enable analysis of the trade-offs involved with retributivist punishment.

Next, in his aptly titled article *Retributive Justice in the Real World*, Michael Cahill recognizes the conceptual difficulty of bridging retributivism and utility, but he ends up suggesting that Wittman’s optimism can be rendered *operational* through careful and flexible adjustments in the schemes for distributing retribution.¹⁴⁹ In proffering his notion of “consequentialist retributivism,” Cahill virtually mocks absolutist retributivism as a quixotic notion that is forced to engage in self-limiting rationalizations to escape its inability to deal with human error and scarce resources, and institutional agency costs.¹⁵⁰ And as for threshold retributivism, he decries it as abstract and metaphoric, incapable of determining at what point in a real system of criminal justice we can determine when the retributivism principle must arise to rein in the forces of utilitarianism.¹⁵¹ Overall, he views most retributivism as too abstract to help us judge a criminal justice system because it can at best tell us about the optimal punishment in individual cases but is likely to do so only in the extreme cases at either end—from torture to trivial cases.

In Cahill’s view, retributivism is a justifying principle of punishment that insists that certain acts be punished and that posits at least degrees and types of punishment for these acts. But Cahill would redefine retribution as a general *goal* of punishment, not an *obligation* to punish.¹⁵² He says that we can thereby see retribution as an intrinsic virtue to maximize as best we can, so we can create a fungible amount of retribution that can be doled out according to conventional means of

148. *Id.* at 218–19.

149. *See* Cahill, *supra* note 113, at 836.

150. *Id.* at 828, 857. As he describes absolutist retributivism, it would at most take into account the costs of apprehension and the risk of error in an effort to keep the net of deserved punishment as wide as possible. *Id.* at 848. Moreover, in his view, absolute retributivism believes that the degree of severity of a crime is irrelevant to the obligation to punish it. Thus, when resources are scarce, the absolute retributivist will choose to at least maximize the sheer number of crimes punished and will thereafter go after those easiest to apprehend and most likely guilty—which may turn out to be such low-level criminals as shoplifters. *Id.* at 849–50.

151. *Id.* at 858.

152. *See id.* at 851, 868.

rational government planning in the face of scarcity.¹⁵³ In Cahill's view, the key step may involve taking an "agent-neutral" rather than an "agent-relative" approach to retributivism.¹⁵⁴ Under an agent-relative approach, where act and individual must be the measure for the right punishment, we cannot escape the category of questions and externalities that White poses, and the system is stuck with lumpy inefficiencies that may thwart retribution. But in an agent-neutral approach, we can aggregate individual "amounts" of desert into a whole, and then do a cost-benefit analysis to ensure that we are getting the maximum possible amount of punishment or "desert-based punishment" at the lowest possible cost.¹⁵⁵

Thus, for Cahill, retributivism can take on questions of implementation while also fending off possible criticism that mutual contingency of various stages of enforcement and punishment doom the coherence of the retributivist program. So long as we can stipulate that a legislatively assigned punishment can fairly represent the deserved punishment for a crime, we can then proceed to some simple hypothetical calculations, and can do so by stages of enforcement. So for example, suggests Cahill, if we look at the stage of police investigation and apprehension, we can work up figures for the cost of apprehending an offender, then the number of offenders, then the likely false-positive error rate, and we then calculate the cost per "unit of deserved punishment" and ask the police to find ways to maximize it.¹⁵⁶ The police need not get caught up with such questions as whether to give all offenders some punishment while sacrificing some of the punishment they deserve, or any other distribution or triage formula which may also sacrifice individual desert. When prosecutors inherit these police choices they can perform a parallel calculation. Even in the face of such possible problems created by the police, Cahill's good news is that the legislature can holistically coordinate all these stages, for example, by defining sentences so as to anticipate and account for the allocation decisions by various actors.¹⁵⁷ He claims that his model offers both suppleness and precision because it can at least consider such choices as the following: whether to emphasize severity or certainty;

153. *Id.* at 851.

154. *Id.* at 833.

155. *Id.* at 855.

156. *Id.* at 843.

157. *Id.* at 856. Thus, the legislature can set sentences higher if it is likely that prosecutors will engage in aggressive plea-bargaining and perhaps also legislating procedural rules to govern police and prosecutorial choices. *Id.*

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whether to aim for wider distribution of punishment as opposed to triage; whether we should exhaust maximum punishment for serious crimes before looking further down the culpability ladder; or whether the optimizing device should focus error rates and apprehension costs per category of crime regardless of its egregiousness.¹⁵⁸

In rebuttal to these efforts, Kenneth Avio insists that the retributivist–utilitarian relationship exhibits a deep conceptual divide that cannot be healed. Avio reviews various efforts to marry retributivism to utilitarian economics but concludes that “a plausible efficiency-based rationale for finite punishment remains to be articulated” and that “[p]unishments that simultaneously optimize and are deserved . . . may not exist.”¹⁵⁹ He runs through the versions of retributivism that purport to accommodate welfare or scarcity, but he rejects each one as incoherent. He takes on the hybrid retributivism inspired by Rawls and H.L.A. Hart,¹⁶⁰ and later rearticulated by Sharon Byrd: adherence to a strong deontic duty to punish but positing that criminal law can be consequentialist in its overall purpose—to threaten punishment so as to deter—but retributive in meting out punishment for individual acts.¹⁶¹ As usually understood, this hybrid theory amounts to the standard deterrence approach constrained by negative retributivism (ruling out intentional punishment of the innocent, as well as disproportionate penalties). But because of the equation of desert to harm and the practical impossibility of consistent (much less full) enforcement, this combination, in Avio’s view, is a conceptual failure.¹⁶² For example, while few deterrence advocates would endorse deliberate punishment of innocent persons, they do recommend disproportionately high punishments to compensate for the uncertainty of apprehension and prosecution (a standard result from the economics of crime). But negative retributivists condemn excessive punishment of the guilty as

158. *Id.* at 821, 833–35.

159. K.L. Avio, *Economic, Retributive and Contractarian Conceptions of Punishment*, 12 L. & PHIL. 249, 259, 268 (1993).

160. *Id.* at 262–68.

161. *Id.*; see also B. Sharon Byrd, *Kant’s Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 L. & PHIL. 151 (1989).

162. Treating hybrid retributivism as an effort to salvage a real world role for retributivism, Avio insists that given the impossibility of punishing all deserving offenders in accordance with the harm they cause and the various kinds of slippage within the system in catching and convicting offenders in the first place, the logical demand of deterrence—that it punish at the marginal level of sanction to the offender to match the marginal gain or harm of the crime—is a fantasy in a real world criminal justice system. Avio, *supra* note 159, at 268.

well as punishment of the innocent, and so would prohibit these artificially increased penalties. In sum:

[P]unishment that is retributive in its execution (i.e., equal in severity to the direct harm experienced by the victim) is generally not credible as an effective threat as perceived by rational prospective offenders. [Hybrid retributivists] insufficiently appreciate that the threat of punishment arises from, and is communicated by, actually apprehending, convicting, and punishing offenders. . . .

....

... Kantian retributive principles could not be taken seriously if they were over-ridden by the need to attain a degree of deterrence necessary for a consequentialist justification of punishment.¹⁶³

Thus, Avio finds the reconciliation of retributivism and utility in criminal justice virtually dead on arrival. That is, he stays within the realm of fairly abstract theory, never venturing into the world of social fact. But one can infer from his views that since retributivism cannot harmonize with any approach to punishment meant to enhance utility he would hardly be surprised that modern retributivism seems irrelevant to mass incarceration. Or he might even argue an excessive commitment to retributivism might even explain mass incarceration.

A subtle tonal variant on Avio's skepticism comes from Mark White.¹⁶⁴ White acknowledges that there are ways of optimizing the amount of retribution a society exercises, and thus is somewhat less concerned with abstract coherence than Avio.¹⁶⁵ In contrast to Wittman's "no problem" attitude, White treats optimizing efforts as tragically, though not futilely, entailing sacrifices of justice, and his premise is that a certain category of dilemmas are the true measure of the sacrifice.¹⁶⁶ White's predicate is that retributivists can purport to retain a modicum of purity in the system by applying the principles solely to the punishment of the convicted, relieving the agents of apprehension and prosecution of any obligation to maximize

163. *Id.* at 267–68.

164. See Mark D. White, *Retributivism in a World of Scarcity*, in *THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS* 253 (Mark D. White ed., 2009).

165. See *id.* at 266.

166. *Id.* at 254.

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retribution.¹⁶⁷ But is it the case that only punishment of convicted persons must adhere to retributivist principles, so that apprehension and prosecution, which influence the probability of punishment, to be optimized according to a purely utilitarian model? If so, the interactive effects of these differential approaches would be complex and unpredictable. For example, if retributive punishments for major crimes are very high, the resulting higher prison costs might drain resources from police and prosecutors and thus disserve crime prevention, although these high penalties might have the secondary benefit of increasing deterrence and thereby saving the budgets for these earlier stages. But if we expand the domain of retributivism to cover both punishment and prosecution, would we then not only have to punish all convicted persons rightly for their crimes but also ensure that we prosecute all probably guilty persons—and no innocent ones? Or do we choose a theory of retribution that allows actors at various stages to stress probability (frequency) of conviction rather than severity of the charge or possible penalty? In the end, White fears that any attempt to accommodate the cost or uncertainty of apprehension or prosecution undermines the purity of the culpability measure.¹⁶⁸

4. A Critique of the Critiques

The attacks on retributivism for the alleged incoherence of its own internal logic are well-established. Of course, none of the other purposes of punishment can utterly free themselves of internal incoherence, so the concern for abstract purity may be unfair. But even if we proceed to somewhat less abstract concerns like the possibility of a metric of proportionality, through the perspective of Western's book, retributivism seems feckless and irrelevant. There is no point in discussing the abstractions and nuances of proportionality when in some rough sense American punishment is so wildly disproportionate to crime, whether we focus on crime and punishment in the collective sense or in regard to the specific misconduct of individuals. There is little point in discussing the moral desert of particular acts when in some rough sense, we are long past the point of marginally identifying bad acts to punish but instead use our penal laws to add new tranches of offenders to a vast and self-reinforcing status. A key fallibility of retributivism lies not in the failure to fine-tune adjustments of punishment to desert, but in the close to universal mismatching of crime

167. *Id.* at 266–67.

168. *Id.* at 269.

and punishment, as the formal sentence is multiplied in severity by the aggregated earnings penalty¹⁶⁹ and lifetime recidivism that imprisonment produces. Punishment ostensibly based on bad acts may have so thwarted the social and behavioral development of inmates that it creates a demographic status that in turn becomes the cause of further incarceration.

On the other hand, as for some of these newer critiques that demand that retributivism account for social fact, let me repeat the punch I telegraphed earlier: These critiques of—or corrections to—retributivism that limit the challenge of social reality to resource constraint (or procedural imperfection) stay far on the safe side of the challenge of modern mass incarceration. There is little point in worrying about scarcity of prosecutorial and correctional resources when, given this disproportion, we spend an amount of money so far in excess of what might be needed to sensibly address America's demonstrable crime problem that our resources might just as well be viewed as infinite. For many years this observation has had a kind of technical economic truth to it, given the tendency of states to use debt-delaying bond-issue financing schemes for prison construction that placed corrections off the books for normal budgetary purposes and thus outside the regular realm of political discussion.¹⁷⁰ But less technically, there is no point in worrying about whether American criminal justice is cogently motivated by the purpose of retribution when the effects outrun any ostensible purpose in the first place. Put another way, the system finesses the scarcity problem by externalizing so much of its cost on the very group it punishes, both in terms of the penalties for individual prisoners and the collateral damage done to those on whom they depend.

Nor do the sensible-sounding compromises of "limiting retributivism" salvage this form of critique.¹⁷¹ Aiming directly at the embedding of this in the new MPC of sentencing, Edward Rubin, who is rare even among critics of retributivism for suggesting it is partly to blame for mass incarceration, attacks on several fronts.¹⁷² First, Rubin attacks the predicate notion of the modern story—that retribution at the very least supplied a reliable metric for punishment that would correct the subjectivity, hypercomplexity, and nonuniformity associated with rehabilitation. He insists that it is a phantom argument to say that

169. WESTERN, *supra* note 1, at 125–26.

170. See Kevin Pranis, *Doing Borrowed Time: The High Cost of Back-Door Prison Finance*, PRISON LEGAL NEWS, Nov. 2008, at 1, 1–3.

171. See Rubin, *supra* note 92, at 18.

172. *Id.*

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desert supplies a reliable metric, since the moral judgment it entails may not be limited to supposedly well-defined acts, but rather may have to include many more contextual factors.¹⁷³ Second, in a rare move in modern jurisprudence, Rubin notes that limiting retributivism cannot possibly be applied to justify the recidivist sentences that account for a significant portion of the incarceration rate in the United States today. But most importantly, he argues that the mantra of limited retributivism still gives aid and comfort to stronger retributivism as a valid overarching theory of punishment. Indeed, despite the effort of modern retributivists to distinguish their favored philosophy from atavistic Hammurabian sentiments, it still “smolders with the spirit of revenge,” and proponents of limited retributivism delude themselves if they think that this taint can be “sanitized by philosophic argument.”¹⁷⁴

Rubin’s thesis is that overarching theories of punishment are themselves an enemy of reform, as evidenced by the overreaction to rehabilitation entailed by modern retributivism. He argues that the rhetorical need to reject rehabilitation led its critics to understate its utility when they invoked the “nothing works” trope¹⁷⁵ and to offer highly exaggerated complaints that rehabilitation posed a threat to the personality and autonomy of the offender.¹⁷⁶ The result was to ignore its modest but crucial role in one arena—the arena of prison operation and the value of rehabilitationist principles in mitigating abusive prison conditions.¹⁷⁷ A retributivist mindset among prison officials is not a healthy thing if it renders prison harsher—and is not even logically entailed by retributivist philosophy anyway.¹⁷⁸

173. *Id.* at 33–34.

174. *Id.* at 41.

175. The phrase “nothing works” was made famous by sociologist Robert Martinson, especially in his highly visible article *What Works?—Questions and Answers About Prison Reform*, PUB. INT., Spring 1974, at 22, 48. Even just a few years after that article, other social scientists argued that the widespread absolutely negative view attributed to Martinson was a misreading of his research. See, e.g., James Q. Wilson, “What Works?” *Revisited: New Findings on Criminal Rehabilitation*, 61 PUB. INT., Fall 1980, at 3, 3.

176. Rubin, *supra* note 92, at 73–81.

177. See *id.* at 66–82.

178. *Id.* As Rubin notes, proportionality, oddly enough, has the advantage of *not* being a theory of punishment. *Id.* at 50. It is what Nozick calls a side-constraint to make punishment fairer, regardless of whether the justifying motivation is some form of utilitarianism or anything else. *Id.* at 33. Indeed, Rubin thereby salvages the Robinson–Darley theory from the charge that it lends aid and comfort to harsh retributivists by treating their view simply as an empirical way of assessing the political purchase of proportionality and thereby gaining consent of the governed to whatever the ruling punishment theory is. See *id.* at 63–64. And he adds with modest praise that the key advantage of proportionality of this sort is that American criminal justice now relies almost exclusively on incarceration, as for

A final critical perspective on modern retributivism comes from Jeffrie Murphy, in one of those rare essays that foundationally undoes the very logic of a philosophy of punishment by mere reference to the state of social fact.¹⁷⁹ Murphy is concerned with one rationale for retributivism, the social contractarian notion that we have all implicitly consented to a governing moral code, but his perspective undermines the logic of retributivism more broadly. He argues that social contractarianism's premise is that people

are viewed as being part of a community of shared values and rules. The rules benefit all concerned and, as a kind of debt for the benefits derived, each man owes obedience to the rules. In the absence of such obedience, he deserves punishment in the sense that he owes payment for the benefits. For, as a rational man, he can see that the rules benefit everyone (himself included) and that he would have selected them in the original position of choice.

... But to think that [this] applies to the typical criminal, from the poorer classes, is to live in a world of social and political fantasy. . . . [T]hey certainly would be hard-pressed to name the benefits for which they are supposed to owe obedience.¹⁸⁰

Murphy's challenge, which predates mass incarceration, is based on a general assumption of income inequality. As Western's book makes clear, the social facts of mass incarceration pose a challenge of a different order of magnitude: Is it possible to defend an ethos of individual responsibility when it is instantiated in a practice that has led to the mass production of ruined lives? If the collateral social and economic consequences of incarceration are so profound and metastatically unpredictable, if they serve to multiply social and income inequality, perhaps the matching of punishment to crime has become a hopeless exercise. If so, then the traditional critique that retribution must account for the fallibility of the institutions of justice misses the point that the work of Western and others teach.

serious punishment, the arithmetic of time makes such judgment-sorting easier. *Id.* at 50.

179. See Jeffrie G. Murphy, *Marxism and Retribution*, in PUNISHMENT: A PHILOSOPHY AND PUBLIC AFFAIRS READER 3 (A. John Simmons et al. eds., 1995).

180. *Id.* at 26.

a. Incapacitation

Incapacitation would seem to be the least problematic of the rationales of punishment, both theoretically and empirically. It rests on the obvious point that a person in prison cannot commit crimes outside of prison, and if we have decent information about the criminal proclivities of an offender, we can reasonably estimate the number of crimes prevented for a particular period of his life. Moreover, for the same reason, among utilitarian rationales incapacitation seems especially harmonious with retribution, since what it accomplishes seems so closely allied to what the offender has done or is likely to do. Of course, things are not all that neat. For one thing, it may be a matter of chance what particular offense sends an offender to prison; moreover, that particular offense may bear a weak relationship to the nature and frequency of crimes he is likely to do if set free, or to the length of time for which we can project his proclivities. Worse yet, a sentence measured by those empirical speculations might bear little relation to what the polity would see as a fair punishment for that offense. Indeed, these concerns cause worry that the argument for incapacitation does not easily distinguish away the knotty problem of “preventive detention,” where the triggering information about an offender’s proclivities might not be a convictable offense at all.

The stock story of the recent politics of the incarceration boom focuses far more on retribution than incapacitation, but the common political rhetoric of “public safety” surely implies that incapacitation is salient in the minds of the polity. And the most obvious challenge that mass incarceration poses to incapacitation is, as noted earlier, that the continuing post-1990 spike in imprisonment seems to have accounted for only a small fraction of the reduction in crime. But the problems of incapacitation in a time of mass incarceration are still more complex.

The incapacitation justification for punishment was briefly publicly ascendant in the 1970s, under the name of “selective incapacitation,” championed by the neoconservative James Q. Wilson.¹⁸¹ Responding to the crime wave of the era, Wilson argued that some humans had a certain irreducible proclivity to commit crimes that was immune to liberal do-good efforts to ameliorate the underlying social “causes” of crime. Faced with this problem of original sin, the best the state could do was to isolate criminals from potential victims. Wilson argued that incapacitation could rely on criminological evidence to identify the

181. JAMES Q. WILSON, THINKING ABOUT CRIME 156 (2d rev. ed. 1983).

likeliest criminals and likeliest recidivists, so that isolation could be keenly parsimonious.¹⁸²

Most of the criticism of Wilson attacked his key empirical premises. One complaint was about the quality of the social science predicting future criminality on the basis of conventional criteria of personality and past conduct, and that any machinery to implement such a scheme is likely to be too informal, error prone, and not self-correcting.¹⁸³ Another was that claims that altering prison rates to achieve “selective incapacitation” could reduce the crime rate grossly mismeasured the amount of incapacitation, failing to account for eras where vast numbers of antisocial people were held in mental hospitals.¹⁸⁴ Another was about the “replacement effect,” the concern that the premise of selective incapacitation is flawed because the key variable affecting the number of crimes is not the number of criminally inclined people on the streets but the number of criminal opportunities.¹⁸⁵

These criticisms receive their richest empirical treatment from Zimring and Hawkins in their 1995 book precisely titled *Incapacitation*.¹⁸⁶ But Zimring and Hawkins attack the premises and products of incapacitation in more foundational ways. They review the strange shadow history of this concept in its relationship to the other purposes of punishment and its salience in academic debate generally. The gist of their argument is that selective incapacitation rose to some prominence not because it had much intellectual or empirical foundation, but because, along with deterrence, it served a default function: For utilitarians, it was the best rationale available to fill the breach when rehabilitation faltered.¹⁸⁷ Indeed, the selective version of incapacitation theory won attention because it seemed so compellingly logical, found support in available episodic studies for those disinclined to do original research, seemed more demonstrable than deterrence,

182. *Id.* at 145–58 (examining the various studies and explaining that criminal justice “operates by trying to predict future behavior”).

183. See Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFF. L. REV. 689, 711 (1995); see also Alfred Blumstein & Jacqueline Cohen, *Characterizing Criminal Careers*, 237 SCI. 985, 985 (1987) (describing the “considerable difficulty of observing directly individual crimes or tracking carefully the patterns of offending by individual criminals in order to collect reliable data”).

184. See Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751, 1755 & fig.1, 1760–61 (2006).

185. See, e.g., KING ET AL., *supra* note 33, at 6 (explaining the replacement effect in the context of the drug market).

186. ZIMRING & HAWKINS, *supra* note 92.

187. *Id.* at 3–4.

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and so was a mutual enabler with public safety policies.¹⁸⁸ Zimring and Hawkins assert that promoters of selective incapacitation were awkward and hesitant in their research, rarely undertaking rigorous efforts to break down their data in terms of subcategories of criminals.¹⁸⁹

As a result, Zimring and Hawkins argue, beyond all the conceptual and empirical flaws in selective incapacitation, that the justifying rationales for incapacitation in *general* terms, as an *overall* animating purpose of punishment, have been neglected.¹⁹⁰ Perhaps because it seemed mostly like a concession to the failure of rehabilitation,¹⁹¹ perhaps because as a pure theory of punishment it has trouble finessing the problem of preventive detention, incapacitation has never been given general fundamental scrutiny. As a result, incapacitation's problems run well beyond the common attacks on Wilson's promotion of it. As Zimring and Hawkins point out, however, there have been numerous empirical studies of selective incapacitation, yet these studies have been remarkably episodic and noncumulative, and they have been "dialectical," in the sense of one study aiming to attack another, rather than examining fundamental questions, and in some ways its proponents have proceeded more deductively than inductively.¹⁹² In terms of specific empirical problems, Zimring and Hawkins question the ability of criminologists to measure crime proclivity at any specific period. Just to figure out how many crimes someone committed just before prison requires finessing problems with such unreliable data as retrospective official measurements and self-reporting surveys. Even if we can get reliable information about this much-studied "window period" occurring just before incarceration, mathematically projecting forward from any such data is itself daunting, especially if the window period itself does not usefully predict crime frequency in the next immediate phase of the offender's career.¹⁹³

As Zimring and Hawkins put it, incapacitation proponents tend to be entranced by the notion of a "fixed lambda" between the crime rate and the counterfactual crime rate absent prison, and do not consider the social contingency of such a counterfactual, paying far too little

188. *Id.*

189. *See id.* at 97.

190. *Id.* at 12–13. Ironically, Bentham himself had briefly discussed incapacitation but viewed it fairly dismissively as a weak partner to general deterrence. *Id.* at 19–21.

191. *Id.* at 61.

192. *Id.* at 38–41.

193. *Id.* at 83, 88–91.

attention to modern theories of crime causation and motivation.¹⁹⁴ Moreover, the promoters of selective incapacitation ignored a worrisome array of types of endogeneity and interaction with other punishment rationales that incapacitation might entail. For one thing, they did not address the problem that the police and other agents of the state are always themselves making predictions that will skew prison populations toward higher risks. In addition, there is the problem of diminishing returns—marginal changes in imprisonment are always likely to focus on the least dangerous. Thus, under any regime, given the uncontroversial necessity of imprisoning the most egregious criminals, and the nonincarceration of the least dangerous offenders, even a strong shift in Wilson's direction is likely to work only at the margin of middle-level offenders such that it is unlikely to significantly affect the cost-benefit rationality of imprisonment. Further, it is obvious that offending rates of low-level criminals may increase in response to shorter sentences because of decreased deterrence.¹⁹⁵

Finally, in both conceptual and empirical terms, the proponents have been clumsy in attempts to measure the costs that further crime would impose. For example, Zimring and Hawkins say estimates of these costs avoided may be improbably high because of some of the proxies drawn from tort law. Indeed, they acidly remark that if such proxies are to be used, then the most important incapacitation target in the United States may be drunk drivers.¹⁹⁶

Ultimately, Zimring and Hawkins view incapacitation as a backup utilitarian argument that, perhaps more than deterrence, was available as an abettor of harsher criminal laws, especially recidivist laws and prison expansion. Indeed, incapacitation laid out the conceptual vocabulary that helped create law-and-order politics and Wilson's work became part of a more general neoconservative turn in American intellectual culture in part because it so explicitly derided the individual psychology of social causation questions that modern social science has not accomplished much with. In any event, whatever efficiency one might have hoped could be realized by better predictions of future criminality has been obliterated by mass incarceration. In our recent politics of incarceration, little value has been placed on accurate predictions of recidivism. It also moots those predictions, by creating social conditions that put all inmates at very high risk of an endless

194. *Id.* at 46.

195. *Id.* at 36.

196. *See id.* at 139, 141.

return cycle, whatever individual propensity to recidivism they might have shown in a different social context.

A final irony is that when forced to serve as a generally justifying purpose of punishment, incapacitation cannot sustain its own integrity as a purpose. Indeed, as it reverts to selectivity to save its integrity, the irony is that the narrow targeting of selective incapacitation law would seem to show that incapacitation is not the overall purpose. Rather, it implicitly validates rehabilitation as a reverse default.

Consider one more angle on the unstable boundary of incapacitation from Guyora Binder.¹⁹⁷ Binder has eloquently argued that the social reality of prisoner-on-prisoner crime raises doubt about whether anyone could truly believe that incapacitation is the goal of incarceration. The promoters of selective incapacitation must assume either that crime does not occur in prison, or prison crime simply does not count. The former assumption has never been true, and in an era of overcrowding wrought by the spike in imprisonment, the limited research suggests that while sexual assault has garnered the most attention,¹⁹⁸ the number of criminal-on-criminal assaults is extremely high.¹⁹⁹ “The prevalence of prison violence raises the question whether incapacitation theory is truly concerned with reducing the risk of violent crime, or merely *redistributing* its risk from innocents to past offenders.”²⁰⁰ The position that only nonoffenders deserve protection from violence would seem to be a principle of retributive desert rather than utility. Such segregation of offenders not only sets them apart from “society” physically—it also sets them apart from “society” symbolically, by implying that their welfare does not count in totaling up the welfare gains and losses from incarceration.

197. JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 56–58 (6th ed. 2008).

198. HUMAN RIGHTS WATCH, *NO ESCAPE: MALE RAPE IN U.S. PRISONS* 3–5 (2001). The reporting rates for sexual assault in prison may be less reliable than for non-sexual assaults in prison and sexual assaults outside prison, but the consensus is that a significant fraction of jail and prison inmates have been so victimized. *See generally* Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 139–49 (2006).

199. Although data on in-prison crime can never be very comprehensive or reliable, studies do suggest that the rate of sexual assault is higher in prison than in the general population. Furthermore, although it has not increased in recent years, the rate of sexual assault has probably not declined. *Compare* ALLEN J. BECK ET AL., U.S. DEP’T OF JUSTICE, *SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09*, at 5 (2010), with Jennifer L. Truman & Michael R. Rand, *Criminal Victimization, 2009*, BUREAU OF JUSTICE STATISTICS BULL. (U.S. Dep’t Justice, Wash., D.C., 2010).

200. KAPLAN, WEISBERG & BINDER, *supra* note 196, at 57 (emphasis added).

Binder's and Zimring and Hawkins' insights about how incapacitation should be recharacterized as a mask over another rationale for punishment jibes with one of Zimring and Hawkins' cautions about these rationales generally,

that very often justifications for particular penal practices are produced after their implementation and are rationalizations of change rather than causes. One counter to the notion that renewed emphasis on penal restraint caused larger numbers of prisoners is the possibility that the considerable growth in prison population was itself the cause of the voluminous rhetorical output that accompanied it. These chicken-or-egg problems are frequently encountered when we seek to unravel the relationship between theory and practice in penal history, but they are not easier to resolve because of their frequent recurrence.²⁰¹

b. General Deterrence

If one looks to theoretical commentary on deterrence that parallels what we see on retribution (and the absence of which for incapacitation was noted by Zimring and Hawkins), there is not much. No one doubts that preventing crime is a legitimate government goal, and so theoretical debates about general deterrence have usually been variants on the more general debate between retributivism and utilitarianism: Is it illegitimate to "use" a new offender for the purpose of deterring others where the degree of punishment to send the deterrent message exceeds the offender's desert? Of course, the field of theoretical law and economics, in the hands of such leaders as Steven Shavell and A. Mitchell Polinsky, has made a massive intellectual investment in the abstract modeling of marginal deterrent capacities of various types of sanctions.²⁰² Occasionally, one sees a fresh framing of the foundational questions. Notably, Anthony Ellis tries to ground deterrence as a species of collective self-defense against aggression by playing out the analogy to individual self-defense doctrine.²⁰³ He addresses a key conceptual problem: even if the state can plausibly threaten harm to deter offenses, that self-defense rationale does not obviously justify actually enforcing the punishment after the threat failed to deter the

201. ZIMRING & HAWKINS, *supra* note 92, at 72–73.

202. See, e.g., A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1, 1–2 (1999).

203. Anthony Ellis, *A Deterrence Theory of Punishment*, 53 PHIL. Q. 337, 337–38 (2003).

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particular offender.²⁰⁴ So Ellis tries out some creative finessing of this issue, suggesting, for example, that in order to make the threat credible, the state must precommit and irreversibly prearrange to execute the punishment.²⁰⁵

Such new forays into jurisprudence aside, the scholarship on general deterrence is all about refinements in the empirical technology needed to assess the deterrent effect. That assessment faces daunting challenges in understanding psychology, but an old and still agreed-on standby in this area is that insofar as the evidence supports deterrence effects, certainty of punishment appears to have more effect than severity because it is more salient for people with manifest higher discount rates.²⁰⁶ But once we get past such general empirical observations, if we work with ostensible correlations of changes in actual punishment and crime rates, controlling the variables is massively complex. Much of this work has been stuck in the perennial arena of the death penalty, where, despite occasional new claims of solid proof of marginal deterrent effect of executions, the limitations on the data have probably rendered the hypothesis unproved and may be ultimately unprovable.²⁰⁷ Sometimes other natural experiments arise, and the necessarily spotty and episodic studies of these events produce little clear evidence of a marginal deterrent effect. Thus, David Lee and Justin McCrary took advantage of data about the change in punishment due to reaching adult status—a sharply discontinuous change in vulnerability to punishment readily

204. *Id.* at 338–39.

205. *Id.* at 340–41. Thom Brooks challenges Ellis’s theory for the imperfections of its analogy between the individual and the collective: that self-defense-based deterrence is irrelevant to nonviolent or victimless crimes, and that the excuse allowed for reasonable mistakes in individual self-defense would have to work as justifications at the collective level. In addition, complains Brooks, Ellis necessarily impurifies his deterrence theory with retributivism when he contrives the crime of “failing to heed a deterrent warning” and when he smuggles in a reasonableness limitation on the magnitude of the deterrent penalty. Thom Brooks, *On Ellis’s Deterrence Theory of Punishment*, 92 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 594, 594–96 (2004).

206. See David P. Farrington et al., *Changes in Crime and Punishment in America, England and Sweden Between the 1980s and 1990s*, 3 BRIT. J. CRIMINOLOGY 104, 128 (1994) (noting that risk of conviction could alter crime rates but that more empirical research seeking that correlation is necessary). Another wrinkle, in terms of *specific* deterrence and the subjective experience of punishment, involves “duration neglect.” Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1096 (2010–2011). Some research “suggest[s] that it is both the maximum intensity and the endpoint intensity that determine the remembered punitive bite, but that the duration of punishment” has little effect, and that the perception of the punitive bite of incarceration degrades over time. *Id.*

207. See John J. Donohue, III & Justin Wolfers, *Estimating the Impact of the Death Penalty on Murder*, 11 AM. L. & ECON. REV. 249 (2009).

perceivable by the relevant population—and they found little effect of this supposedly strong government message.²⁰⁸ Deterrence research also must stress that the real question is not about actual punishment but the perceived threat of punishment. Thus, nuanced modern studies have tried to isolate the perception variable, figure out whether to test the variable among the general population or the criminal population, and then examine how changes in actual punishment explain the changes in perception.

A rich new study by criminologist Gary Kleck and his colleagues came up with conclusions that will disappoint those who hope that changes in actual punishment affect perceptions thereof to make much difference.²⁰⁹ Kleck combines statistics on the actual severity, frequency, and swiftness of penalties from a wide sampling of counties with surveys of perceptions of residents of those counties.²¹⁰ The analysis controls for many possible influences on perception of punishment independent of the actual facts, and the survey's focus in particular is on self-identified former offenders.²¹¹ The result is a shockingly negligible relationship between differences in punishment fact and differences in perception thereof.²¹² The conclusion is that although the general deterrent effect may operate at some base rate to reduce crime, changes in penal policy or enforcement play little role in sending a message that crime does not pay.²¹³ Indeed, although government might look to different, perhaps better targeted and better publicized ways of delivering the message, a lowering of penalties for many crimes is likely to leave any current deterrent effect undiminished.²¹⁴

If punishment had a significant marginal deterrent effect, the high visibility of harsh punishment in the form of mass incarceration should itself have been a powerful force in reducing crime. But the empirical research summarized by Western—that the post-1990 spike in incarceration can only explain a small fraction of the simultaneous drop in the crime rate—suggests otherwise.²¹⁵ Most likely, we have reached the point at which the baseline punishment in society is so high that

208. See David S. Lee & Justin McCrary, *Crime, Punishment, and Myopia* (Nat'l Bureau of Econ. Research, Working Paper No. 11491, 2005).

209. Gary Kleck et al., *The Missing Link in General Deterrence Research*, 43 CRIMINOLOGY 623, 653–54 (2005).

210. *Id.* at 633.

211. *Id.* at 636–38.

212. *Id.* at 653.

213. *Id.* at 653–55.

214. See *id.* at 654.

215. See WESTERN, *supra* note 1, at 44.

potential criminals are psychologically inured to additional deterrence. But as Western has shown, the potential deterrent message is even greater than what is captured by actual frequency or duration of imprisonment given the lifetime comic and employment penalty of incarceration as both an additional material penalty and a source of stigma. Imagine the last twenty years of the imprisonment increase as an experiment to see if there is a megadose marginal increment so large that it shakes up perceptions in ways that Kleck did not find. If so, the experiment failed.

B. Utilitarianism: Rehabilitation

The last of the traditional theories of punishment is rehabilitation, and we have perhaps come too far to revive it as serious justification for our system. We could have said that prisons successfully incapacitate if we had ignored prisoner-on-prisoner crime, but this fact makes rehabilitation no longer a realistic argument. When an inmate appears less prone to crime upon release, the explanation statistically most likely is simple aging. Modest improvements do come in prison through simultaneous drug rehabilitation, vocational counseling, and educational opportunities, and massive diversion of funds in this direction could be salutary both to incarcerated persons and to the ideal of rehabilitation.

A broader conception of rehabilitation within our system of criminal justice implicates community-based diversion, early-release legislation, and evidence-based sentencing. Because of the resemblance these efforts bear to the rehabilitative orientation of the American system of criminal justice before the 1970s, jurists tend to conceive the movement in terms of rehabilitation.²¹⁶ But properly understood, the use of alternative dispositions, as opposed to in-prison programs, is an avoidance maneuver that betrays our tacit acknowledgement that the effects of the system itself are not rehabilitative but criminogenic.²¹⁷

Distinct from both in-prison therapeutics and diversion from the jailhouse is the promising recent use of “shock therapy” through what has come to be called “smart punishment” or “motivational jail.”²¹⁸ This renaissance of rehabilitative sentiment began in the mid-2000s with

216. See Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415 (2012).

217. *Id.* at 421.

218. See James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1557 (2003).

Hawaii's Opportunity Probation with Enforcement (Project HOPE).²¹⁹ Under the direction of Judge Steven Alm, the program aimed to reduce the burden that expensively harsh sentences foisted on the state's criminal justice system partly by "scaring" minor offenders back in line.²²⁰ The movement proved successful enough that several states have implemented similar policies preferring a response to criminal behavior more like that of a concerned parent in correction than like that of a retributivist government in punishment.²²¹ But this phenomenon is not precisely an exception to the functional obsolescence of rehabilitation in a system of mass incarceration—corrective effects come from short and controlled application of a medicine that still poisons in larger doses. Rehabilitation results, apparently, from a tangible, credible threat of further incarceration, and not from jail time itself.

The overall picture is that today's programs that do succeed in rehabilitation aim at avoidance of the system outright, mitigation of the effects of time spent behind bars, and reentry of people whose lives the system has damaged. As Western notes, in the age of mass incarceration, "rehabilitation" seems to have taken on this new meaning—we no longer pretend that prison itself rehabilitates, recognizing instead that reintegration of former prisoners just requires rehabilitation from collateral damages.²²²

The greatest promise for a true rehabilitation of rehabilitation may lie in the recent push to base our approaches to criminal justice anew upon empirical evidence, whereby judges use empirical data in an "actuarial manner," tailoring the disposition based not on vague impressions but on concrete indicators.²²³ After all, alternative options clearly do vary in how well they reduce crime.²²⁴ This may be an odd-sounding idea, but what gives us new reason to hope for broader acceptance of these "evidence-based" models is the recent realistic recognition on both sides of the political aisle of mass incarceration's

219. See generally Mark Schoofs, *Scared Straight . . . by Probation*, WALL ST. J. (July 24, 2008), <http://online.wsj.com/article/SB121685255149978873.html>.

220. *Id.*

221. See Nolan, *supra* note 218, at 1557.

222. See WESTERN, *supra* note 1, at 192–93.

223. See J.C. Oleson, *Risk in Sentencing: Constitutionally Suspect Variables and Evidence-Based Sentencing*, 64 SMU L. REV. 1329, 1336–37 (2011). For a good review of the contemporary arguments for evidence-based approaches to prisoner reentry, see ROGER K. WARREN, NAT'L INST. OF CORR. & NAT'L CTR. FOR STATE COURTS, EVIDENCE-BASED PRACTICE TO REDUCE RECIDIVISM: IMPLICATIONS FOR STATE JUDICIARIES (2007).

224. See Robert Weisberg, *Tragedy, Skepticism, Empirics, and the MPCs*, 61 FLA. L. REV. 797, 821 (2009).

long-term untenability.²²⁵ Somehow, we must address the problem—if evidence-based models work, all the better. The prerequisite will be that our politicians abandon naïvely ideological intransigence regarding the system as it stands.

VI. CONCLUSION

Tonry captures the ultimate difficulty of reconciling punishment theory with practice in Hegel's cautious, flexible view: "[E]quality remains . . . the basic measure of the criminal's *essential* deserts, but not of the specific external shape which the retribution should take."²²⁶ Tonry's elegant essay ends with an acerbic look at a legal academy in which fashionable philosophies of punishment, especially liberal hybridizations of retributivism, seem to "provide coherent, articulable bases for assessing whether particular punishment policies, practices, or decisions are just[.]"²²⁷ despite a great deficit of moral clarity: "Policies have been adopted, and people punished under them, that cannot be justified under any of the normative frameworks developed in the past two centuries."²²⁸

Tonry refers us to the case of *Ewing v. California*, in which the Supreme Court upheld a three-strikes sentence of life incarceration for the theft of three golf clubs.²²⁹ Following its usual protocol to determine whether this punishment violated the Eighth Amendment as cruel and unusual, the Court considered whether any traditional rationales of punishment could support the sentence, deferring to the legislature when in doubt.²³⁰ Tonry asserts bluntly that this sentence would have outraged Kant, Bentham, and every serious philosopher in between.²³¹ But of course, courts never really assess punishment on moral terms, just on democratic terms—"contemporary conceptions of just punishment are at best muddled and morally incoherent and at worst non-existent. . . . Justice by plebiscite, however, is not a normative conception of justice."²³²

225. Klingele, *supra* note 216, at 423–24.

226. G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 129 (Allen W. Wood ed., H.B. Nisbet trans., 1991).

227. Tonry, *Introduction*, *supra* note 5, at 22.

228. *Id.* at 23.

229. *Ewing v. California*, 538 U.S. 11, 17–18, 30–31 (2003).

230. *Id.* at 24–25.

231. Tonry, *Introduction*, *supra* note 5, at 23.

232. *Id.* at 24.

The United States has proved capable of reducing its incarceration rate, as it did slightly in the late 1960s and early 1970s before today's major increase began.²³³ Even as he became the leader of a new conservative movement, Governor Ronald Reagan effected an amazing 34% decrease in California's prison population largely through expansion of probation and through more generous invocation of parole and fewer revocations.²³⁴ Paradoxically, today's politicians have gotten somewhat ahead of academics toward reducing mass incarceration. Budget problems have forced legislatures to arrange hushed truces on demagoguery on crime, a lower rate of crime has pushed law-and-order politics off the agenda in national elections, and some states have reduced mandatory minimums for drug offenses—an infamous legacy of the 1970s.²³⁵

Moves toward national sanity in criminal justice are modest and politically fragile. The conventional view is that mass incarceration is here to stay for two primary reasons: First, as recent analyses have shown, once incarceration reaches a critical level, the criminogenic nature of the prison experience and the resilience of American institutions of criminal justice in reabsorbing and recycling recidivists (“net-widening”) reinforce the phenomenon;²³⁶ and second, although drastic retrenchments have actually happened, as under Reagan in California, incarceration numbers are now so great that proportional reductions have become politically infeasible.²³⁷ Jurisprudes of punishment will never play a major role in our penal policy, but they can do better than their current irrelevance by making theory face reality.

233. Gartner et al., *supra* note 41, at 292.

234. *Id.* at 292, 299.

235. Drug courts, diversion programs, and sentencing commissions now keep some low-level felons out of prison.

236. On how parole revocation has become the new major source of prison admissions in California, see PETERSILIA, *supra* note 44, at 73–74. On the complexity and arbitrariness of factors that determine parole revocation and thereby confound any meaningful notion of recidivism, see Wilson, *supra* note 44; and Maxwell, *supra* note 44, at 519–20.

237. Gartner et al., *supra* note 42, at 313–14.